No. 1584.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

California Development Company,
Appellant,
vs.
New Liverpool Salt Company,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

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STATEMENT OF THE CASE.

This suit was originally brought in the Superior Court of the state of California, in and for the county of Riverside.

The suit grew out of the following facts:

The plaintiff was the owner of certain lands described in the complaint, and of a plant for the manufacture of

salt, consisting of many buildings of different kinds, and machinery and various appliances, including a short line of railroad, or spur track, and which is situated at the northern end of what is known as the Salton Sink, at that time situated in the county of Riverside.

The waters of the Colorado river, and doubtless waters from other sources had, in the latter part of 1904, begun to form in the Salton Sink, and what is now known as the Salton lake or sea, and continued to rise until it finally overwhelmed the New Liverpool Salt Company's property, destroyed the buildings and machinery, and a large amount of salt which had been gathered.

At the time the suit was brought, the destruction was not complete, but the waters continued to rise during the whole of the years 1905 and 1906, and eventually submerged and destroyed the entire plant.

When the suit was originally brought, it, of course, sought to recover the damage to the plaintiff's property which had accrued up to that time. The California Development Company had constructed a canal connecting with the Colorado river on the west bank thereof, and by means of which canal the waters of the Colorado river were conducted into the Imperial Valley, and there distributed to the settlers of the valley for use for various purposes, mainly for irrigation.

The waters from the Colorado river did overflow into this canal and cut and enlarge the canal until finally nearly the whole of the Colorado river was flowing into the Salton Sink through the canal and other channels.

The claim on the part of the plaintiff was that this

overflow into the Salton Sink and the consequent destruction of the appellee's property was due to the negligence of the defendant, the California Development Company.

The action was brought to recover the damage to the plaintiff's property, and for an injunction restraining the continuance of the flow of the water from the Colorado river over the plaintiff's lands.

The complaint was molded after the ordinary forms of a suit in the Superior Court of the state of California, and under the provisions of its law as construed by the courts, legal and equitable actions might be joined, and in this case they were; the only equitable feature in the suit, being a suit for an injunction against the continuance of the alleged wrongs.

See original complaint, Tr. pp. 7 to 16.

The cause was removed to the United States Circuit Court, Ninth Circuit, for the Southern District of California, Southern Division, and after the cause was thus removed, the New Liverpool Salt Company, construing its complaint as we have above stated it, made its election to bring the suit on the equity side of the Circuit Court, and the bill was so framed.

And in the bill filed in this court, it alleged its ownership of the lands.

Tr. Vol. 1, p. 62.

That it was engaged in the business of mining, gathering and refining salt, and was the owner of, and operated a mill, drying sheds and warehouses at the northeast quarter of section 14 therein described; that the

buildings were between 700 and 800 feet in length, and equipped with engines, boilers and all the machinery necessary for reducing and refining salt, and that the buildings and equipment were of a value of more than $50,000; that it carried on a large and extensive business, and sold many thousands of tons of salt each year; that sections 15 and 23 described in the said bill were of great value, because they had upon them large deposits of salt.

Tr. Vol. 1, p. 63.

It next describes the Colorado river, and alleges that no part of the waters of the river would naturally flow upon or near the lands of the complainant.

Tr. Vol. 1, p. 63.

Then alleges that for more than a year last past the defendant, the California Development Company, had been carrying on the business of diverting the waters of the Colorado river, and carrying the same to *Calexico,* in the state of California, and distributing the said water by means of various canals, and disposing of the same for the purposes of irrigation. That it had constructed three intakes on the Colorado river for the purpose of diverting the waters and describes the manner in which they are conducted.

Tr. Vol. 1, p. 63.

That the lands of the complainant in the Salton Sink are about 280 feet below the sea level, and that by reason of the contour of the land, and the slope thereof from all points to which the water is carried by the said canal,

all water carried by the canal to such point except such as is used, absorbed and evaporated, finds its way through the various waste and distributing canals, etc., to Salton Sink and to the lands of the complainant.

Tr. Vol. 1, p. 64.

It then alleges that for more than six months the defendant had been carrying a large amount of water, the quantity being such that a flow of between 300 and 500 cubic feet per second passed through the canal in excess of the amount absorbed, evaporated or used for irrigation or other purposes, and that such an amount of water had been, for more than three months past, continually wasting from the canal system of the defendant, and pouring into the Salton Sink, and had produced a lake over 20 miles in length and several miles in width, and overflowed and covered all of section 23, a large part of section 15, and part of the northeast ¼ of the southwest ¼ of section 14, and that the flood had then reached within 200 feet of the buildings described, and would extend still further but for the fact that a dyke had been constructed by the company to prevent it.

Tr. Vol. 1, pp. 64 and 65.

That the water was continuing to increase, and if it was not checked, would, in a short time, overflow the dykes and flood the ground about the buildings, and endanger their safety by rendering the foundations insecure; that the complainant had many thousand tons of salt piled up on the ground inside of the dyke, which by such overflow would be destroyed and ruined; that the water carried sand and silt, which was being deposited

upon the lands covered by the salt, damaging it by covering up the salt deposits and rendering it impure, etc.

Tr. Vol. 1, page 65.

It alleged its ownership of a railroad, and gave a description of it, and alleged that that had been entirely covered by the overflow of waste water, and the deposit of sand and silt. That waste water in large quantities was still running into the lake, and increasing the size thereof; that the climatic conditions at Salton and in the vicinity of the lake and the property of the complainant was such that if the flow of the water was stopped and the defendant not permitted to divert the waters of the Colorado river into the said lake, the same would evaporate and disappear, but if not stopped, the plaintiff would suffer great and irreparable injury by the destruction of its business, and would suffer damages in a sum exceeding $200,000.

Tr. Vol. 1, page 66.

It then imputed all this overflow to the diversion by the defendant of the waters of the Colorado river in excess of the amount required for any useful purpose, and that a continuance of the overflow and flood would result from the continued diversion.

Tr. Vol. 1, page 67.

That the defendant, the California Development Company, had made no provision at the said intakes for the regulation and control of the flow of the waters, and that unless restrained by the court, the defendant would continue to divert the waters in large quantities, and they would naturally overflow the lands of the complain-

ant, and thereby destroy the property and business of the complainant, and occasion complainant great and irreparable injury.

Tr. Vol. 1, page 67.

The complainant then alleged that the railroad switches, rolling stock and their appurtenances, of the railroad had been damaged in the sum of $50,000 by the overflow; that just previous to the flooding of the lands, about 15,000 tons of salt were gathered and ready to be gathered, and which were overflowed and destroyed by the flood, and the complainant had been damaged in the sum of $25,000. That the lands and the salt deposits had, by reason of the floods, been damaged in the sum of $50,000; that the complainant had expended in constructing the dyke to protect its property, and in otherwise protecting it from the flood, $6,000; that the buildings, sheds, mill and machinery of complainant had been damaged by reason of the floods, in the sum of $25,000; that the business had been interrupted, and would be interrupted for a long period of time, and that complainant had thereby been damaged in the sum of $25,000.

Tr. Vol. 1, pages 68 and 69.

Supplemental bills were filed subsequent thereto as the waters increased and the damage became greater, but they simply alleged that the continuance and increase in the amount of the flood caused by said acts had further damaged the lands and salt deposits belonging to the complainant in additional amounts, in one of them the increased damage being in the sum of $180,000 in addition to the amount alleged in paragraph XV of the

complainant's bill, and that by reason of the continuance and increase of the flood caused by defendant's acts, the buildings, sheds, mill and machinery of the complainant's mentioned in paragraph XVII of the bill of complaint herein had been utterly destroyed, and complainant had been thereby damaged in the sum of $30,000 in addition to the amount therein alleged.

Tr. Vol. 1, pages 79 and 80.

This was the last of the supplemental bills, and filed after the entire property of complainant had been annihilated.

After this statement of the damages, the bill then alleges that these acts, doings and threats are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises; and forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator shall not have the relief hereby prayed, your orator prays that the defendant be required to make a full disclosure of all the matters aforesaid and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, etc.

Tr. Vol. 1, pages 69-72, and 80.

Then, after praying for a writ of injunction, both interlocutory and final, and to enjoin the defendant from diverting the waters of the Colorado river in any way whatever unless it should provide suitable headgates and headworks, and control the water so that it should not

flow in excess of the amounts which should be used for irrigation, etc., and that there should be no waste water, the fourth paragraph of the prayer is as follows:

"And that the defendant may be decreed to account for and pay over to your orator the damage occasioned complainant by the violation of your orator's rights; and that your Honors, pending the rendering of the decree above prayed, assess or cause to be assessed, the damages your orator has sustained by reason of the violation of its rights as hereinabove set forth."

Tr. Vol. 1, page 74.

To the bill filed in this court the defendant demurred, upon the ground that it appeared upon the face of the bill that the defendant was not entitled to the relief prayed for.

2. That the bill was multifarious, and because it united two different suits, one for legal, and the other for equitable, relief, and that the same could not be united in this court.

3. That the causes set forth in the bill were not within the jurisdiction of the court sitting as a court of equity.

Tr. Vol. 1, pages 73 *et seq.*

Demurrer to amended bill, and supplemental bill.

Tr. Vol. 1, pages 81 *et seq.*

The demurrer was overruled. The defendant answered the bill, and subsequently thereto filed an amended answer to the bill and supplemental bill, and upon the bill and supplemental bill, and the amended and supplemental answer, the cause was heard.

The answer denies the plaintiff's alleged ownership of the lands described in the bill.

Tr. Vol. 1, pages 87 and 88.

Denies that the complainant was, at the time of filing the bill, engaged in the business of mining, gathering or refining salt, or was the owner of, or operated a mill, drying shed or warehouse on the northeast ¼ of section 14; denied the plaintiff's ownership of the land, buildings, engine, boilers, etc., and denied that the buildings or the equipment were of the value of more than $50,000, or any value, or that the complainant carried on the business as alleged in the complaint.

Tr. page 88.

These denials were for the want of information or belief. The defendant denied also that no part of the waters of the Colorado river mentioned in paragraph IV of the bill of complaint flowed naturally upon or near the lands claimed by the plaintiff.

Tr. page 89.

Denied that the defendant had constructed, upon the Colorado river, three intakes for the purpose of diverting the waters of the Colorado river into the canals mentioned, and denied that at the time of the filing of the said bill, or at any time, the defendant was diverting any of the waters of the Colorado river; denied that any of the waters diverted by the defendant from the Colorado river was carried by the defendant, or allowed by the defendant, to flow to various points, from which points it passed into the New river or Alamo river, or into any waste or distributing canals; and then alleged that the

waters referred to were diverted from the Colorado river in Mexico, by a corporation organized under the laws of the Republic of Mexico, known as La Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), which corporation was the owner of all the canals leading from the Colorado river in Mexico to the town of Calexico in California, mentioned in the bill of complaint, and denied that during any of the times mentioned in the bill, the defendant was diverting any water from the Colorado river which was allowed to flow into either the Alamo or New river, or upon any of the lands described in the bill of complaint.

Tr. pages 89 and 90.

Admitted that the complainant's land was below the level of the sea, and in what is known as the Salton Sink, and that water flowing into the New river or Alamo river naturally finds its way to the Salton Sink unless diverted from the said rivers, but denied that the water flowed upon the lands belonging to the complainant.

Denied that the defendant diverted, or was diverting, any amount of water from the Colorado river into any canal in such manner or quantity that a flow of between 300 and 500 cubic feet per second, or any amount, passed through the canals in excess of the amount absorbed or evaporated or used for irrigation and other purposes, or that streams of water amounting all together to between 300 and 500 cubic feet per second, or any amount, for more than three months prior to filing the bill, or at any time subsequent, had been continually wasting from

the canal system, or pouring into the Salton Sink, or had produced a lake of any size whatever, or had overflowed or covered all or any part of section 23, or of section 15, or of section 14, described in the complaint, or that the said flood waters or lake, at the time of filing said bill, had reached within 200 feet of the buildings in the bill described, or that the waters would have extended further but for the dyke alleged to have been constructed by the complainant.

Tr. pages 90 and 91.

Denied that at the time of the filing of the bill the plaintiff's buildings were in danger, or that at that time the complainant had any salt piled up on the ground inside of the dyke and which might thereafter be overflowed or destroyed or ruined, or that the waters being carried into the lake deposited silt, mud or sand upon the lands covered by the overflow, or that such deposit had, at the time of the filing of the bill, damaged the lands described therein by covering up the salt deposited thereon, or by rendering the same impure or more difficult to mine or refine, or that such damage was constantly or at all being increased by the washing in by the wasteway sand, silt and mud.

Tr. pages 91 and 92.

Denied the plaintiff's ownership of the railroad, and use thereof for the purpose of carrying rough salt from the mines to the mill for the purpose of reducing or refining the same, or that it was used for any purpose.

Tr. page 92.

Admitted that waste water, at the time of the filing of the bill, was still running into the lake and increasing its size, but denied that all or any of the property of the complainant in said bill described would be covered by water, or its business destroyed.

Tr. pages 92 and 93.

Denied that there were no streams of water which naturally run upon the lands described in the bill, in sufficient quantity to cover or flood said land with water, but on the contrary alleged that the flood waters going down the Alamo and New rivers in times of flood such as existed in the years 1904 and 1905, and particularly during the winter season of 1905, and the waters flowing from the natural drainages from the mountains and surrounding locality in said Salton Sink, will flow upon the lands in the bill described, and that the natural flow of said waters, if allowed to take their natural course, would have flowed upon the lands in the complaint described, and that the Salton Sink, without any water being carried therein artificially, during the said year 1905, would have become a great lake, and overflowed the lands and property in the bill described, and that if the canals mentioned in the bill of complaint had not been constructed or built, and the waters of the Colorado river coming down had been allowed to take their natural course, they would have overflowed the banks of the said river, and would have flowed into the channels leading therefrom, and found their way through said channels and over the surrounding country through the sloughs and bayous into the said Salton and Alamo rivers, and would have gone into the Salton Sink and to

and upon and over the lands in the bill of complaint described; and that if the canals referred to had not been constructed, all of the lands described in plaintiff's bill of complaint would have been overflowed by the waters coming down the said Colorado river and finding their way and flowing naturally into the New and Alamo rivers.

Tr. pages 93 and 94.

Denied that the conditions at Salton and in the vicinity of the lake, and the property of the plaintiff, are such that if the flow of the waste waters in the said lake be stopped, and the defendant be not permitted to divert the waters of the Colorado river into said lake, the same would evaporate and disappear, but alleges that the defendant is not, and at no times mentioned in the bill of complaint was, diverting any waters of the Colorado river into the said lake.

And for want of sufficient information or belief to enable it to answer certain allegations in paragraph X of the bill, denied that if the flow of the waste water be not stopped, the complainant would suffer great or irreparable injury by the destruction of all of its property or business, or would suffer damages in a sum exceeding $200,000, or any sum.

Tr. pages 94 and 95.

Denied that all or any of the flooding of the lands of complainant was caused by or was the result of the diversion by the defendant, from the Colorado river, of the stream of water mentioned in the bill, in excess of the amount required for any useful purpose, or that it

was caused by, or was the result of the diversion by the defendant of any waters from the Colorado river whatsoever; or that any overflow or flood would or did result from the continued or any diversion by the defendant of the waters of the river which naturally flowed, or would flow, in another direction.

Tr. page 95.

Denied that the intakes mentioned in paragraph XII of the bill were constructed by the defendant. Denied that unless the defendant constructed head gates for the controlling and regulating of the amount of water flowing in its canal, there would continue to flow through said canal an amount greatly or at all in excess of that required for proper use, which would flow in any lake or upon the lands of the complainant, or destroy or ruin the property or business of the complainant, and denied that unless defendant was restrained by this court, it would continue to divert from the Colorado river large or any quantities of water which would naturally flow in another direction, in such manner that the same would overflow and flood the lands of complainant, or destroy its property, and denied that complainant had no adequate remedy at law.

Tr. pages 95 and 96.

The defendant then, in its answer, denied specifically the damages alleged to have been suffered by the plaintiff. Denied that the railroad had been damaged in the sum of $50,000. Denied that the plaintiff had about 15,000 tons of salt just previous to the flooding, or any salt, gathered or ready to be gathered, which was over-

flowed and destroyed by the flood. Denied that the complainant was, by such destruction of the salt, damaged in the sum of $25,000, or any sum, or that the lands and salt deposits had been, by reason of the deposit of silt or mud by the flood, damaged in the sum of $50,000, or any sum; or that complainant had expended in constructing a dyke for the protection of its property, or moving the salt, or otherwise protecting its property, the sum of $6,000, or any sum, or that the buildings, sheds, mills and machinery of complainant, or all together, had been damaged by reason of the floods, in the sum of $25,000 or any sum, or that the complainant had been engaged in carrying on the business at a profit, or had, by reason of the flood, been interrupted in its business, or would be interrupted, or that complainant was damaged thereby in the sum of $25,000, or any sum.

Tr. pages 96 and 97.

And then, as this amended answer was filed after the first supplemental bill was filed, denied that the complainant had, since the commencement of the action, or by reason of any acts of the defendant, been damaged in any sum whatever.

And denied that the continuance and increase in the amount of the flood had damaged the lands or salt deposits, belonging to the complainant in the sum of $180,000 in addition to the amount alleged in paragraph XV of the complainant's bill, or in any sum whatever, or that by reason of the continuance or increase of the said flood, the buildings, sheds, mill and machinery of the complainant, mentioned in paragraph XVII of the said

bill, had been utterly destroyed, or that complainant had thereby been damaged in the sum of $30,000 in addition to the amount alleged in paragraph XVII of complainant's bill, or any sum. And denied that any part of the flood was caused by the defendant or by any of its acts, and denied that any of the injuries or damages complained of in said bill of complaint were caused by this defendant.

Tr. pages 97 and 98.

A separate answer to the bill was then set forth, and which in substance, is that a certain tract of land in San Diego county in the state of California, known as the Imperial Valley, and which contains more than 400,000 acres of land susceptible of irrigation by the waters of the Colorado river, was, in the year 1896, public land belonging to the United States, and of a dry and sandy character, with little vegetation thereon, and in that condition practically desert lands; but that with water for proper irrigation, they were capable of being rendered fertile and valuable.

Tr. Vol. 1, pages 102 *et seq.*, particularly commencing at page 114.

That in 1896 the defendant corporation, the California Development Company, was incorporated under the laws of the state of New Jersey for the purpose of obtaining the water from the Colorado river, to be supplied to the Imperial Valley, together with a large amount of land in the Republic of Mexico, lying immediately south of the boundary between California and the said republic.

Tr. Vol. 1, page 114.

That the defendant, through an arrangement with a Mexican corporation, undertook to divert the waters of the Colorado river at a point on American soil, and a short distance above the boundary between the United States and Mexico, on the west bank of the Colorado, and by means of a canal to be constructed to conduct the waters of the river through the said tract of land in Mexico, and to the boundary line between the United States and Mexico, with a view to furnishing water for irrigation to the lands referred to in both republics.

Tr. pages 114 and 115.

In pursuance of this arrangement the defendant did, construct a canal, beginning the construction in the year 1900, and constructed it down to and across the lands in the Republic of Mexico, and to the boundary westerly from the Colorado river. That the said canal was constructed openly, and notoriously, and at a large expense; that divers water companies were organized under the laws of the state of California, known as Imperial Water Companies Nos. 1 to 8 respectively, which were organized for the purpose of taking the waters from the said canals and furnishing the same to settlers upon said lands in the county of San Diego, state of California, for irrigation and domestic uses, and contracts were entered into between the defendant and the said several Imperial Water Companies for furnishing to them the said waters, and in pursuance of such contracts, divers lateral canals were constructed by them, and through which the waters of the Colorado river so diverted by the said canal were

to be delivered and distributed to the settlers upon the said tracts for irrigation and domestic uses.

Tr. pages 115 and 116.

The several lateral canals and the main canals were completed, and a large amount of land of the Imperial Valley had been settled upon, and entered, under the laws of the United States, by divers persons who became purchasers of the stock of the said several Imperial Water Companies, which stock entitled them to water for irrigation and domestic uses.

That prior to the commencement of the suit, there had been more than 100,000 acres of the said lands in the said Imperial Valley brought under cultivation, and water had been furnished to the owners of said lands and settlers for irrigation and domestic uses, and that said lands have been proven to be of great value for agricultural and horticultural purposes when supplied with water for irrigation.

Tr. page 116.

That the defendant had been furnishing water to the said several Imperial Water Companies from the main canal connecting with the Colorado river, for two or three years prior to the year 1904, and in the course of the furnishing of water through the said canal at the point of connection with the Colorado river on the west bank thereof, and a few miles north of the international boundary, the said canal had at its head, and for a considerable distance from its head, become filled up with silt so that the canal at its head was incapable of carrying water sufficient to furnish the said owners and set-

tlers upon the said lands with water in quantities sufficient to insure the successful cultivation of said lands, and for that reason, in the year 1904, a second connection had been made with the river, known as the second intake to the said canal, and which intake was a few miles south of the first intake, and connected with the main canal at a point eight or ten miles distant from the Colorado river; and in the course of the use of that intake, which also had become silted, and both intakes had so far filled with silt that it became evident that a sufficient quantity of water could not be obtained in the said canal through the two intakes to furnish the said owners and settlers upon the said lands with sufficient waters for their purposes, and with the demonstration of the fertility of said land when supplied with water, new settlers were continually coming in, and other lands were being taken up and the area of cultivation extended, until it appeared that in the season of 1904 the cultivation would probably extend over an area of 200,000 acres, and to meet the demands of the then cultivated lands, and the prospective extended area of cultivation a third intake was constructed connecting with the Colorado river on the west bank, and connecting with the main canal at a point ten or twelve miles westerly from the Colorado river.

This was constructed because of the prospective demand for water during the season of 1904, and up to that time, the experience of the defendant with the canals and several intakes, had induced the belief that the action of the waters in the said several intakes, instead of washing and expanding the capacity of the in-

takes, tended to fill up the intakes, and to require dredging from time to time to keep the capacity thereof to a point sufficient to carry water in sufficient quantities to supply the people, and in the course of the said experience, it had become necessary at different times, to dredge out the upper ends of the canals and intakes for the purpose of obtaining water in sufficient quantity.

Tr. pages 116, 117 and 118.

In the meantime, and prior to the year 1904, there had sprung up in the Imperial Valley, towns that were to be supplied with water, and the inhabitants of the valley numbered more than 10,000 people who were dependent upon the waters obtained by means of the canals, for irrigation purposes and other uses, and in the construction of said canals, both the main canal and intakes, and the laterals, the defendant had provided for the use of water diverted thereby, and for taking care of the same, by wasting upon a broad expanse of territory, more than 25 miles south of the Salton Sink, in such way that under ordinary conditions, or any conditions which could have been foreseen, the said waters could have been, and would have been, so handled and distributed that no injury whatever would have occurred to the property of others. But in the year 1904 and 1905 the rains falling in that section of the country, and the mountains which constitute the water-shed surrounding the Imperial Valley were greatly in excess of anything that had occurred previously thereto within the knowledge of the people of the said sections. And by reason of these rains, the demand for water for irrigation was made much less than otherwise it would have been, and less than the demand

reasonably to be expected for the season of 1904 and 1905, for irrigation and domestic uses and supplying the said towns. And later in the years 1904 and 1905, and particularly in the winter and spring of 1904 and 1905, and summer of 1905, enormous floods occurred in the Colorado river, with greater frequency and longer continuance than had ever been known to occur in the said river, and in that section of the country before, and by reason of these several causes, mainly the overflow from the Colorado river during the winter of 1904 and 1905, and the summer of 1905, and continuing on down to the time when this answer was made, which was on the day of December, 1906, the main canal became washed out, and vast amounts of water poured from the Colorado river until finally nearly the entire river flowed into said canals, and such was the enormous quantity of flood waters that if there had been no canal there, the Salton Sink would have been filled with water to an extent quite as great as, if not greater than, has actually been experienced. As a matter of fact, the said canals, by embankments thrown up in the construction of them, had prevented a large amount of water from the Colorado river flowing into the Salton Sink by diverting it in other directions to the southward from the said canal.

Tr. pages 118 to 120.

The defendant then further alleged that in the construction of the main canals, of the three intakes, and the laterals, more than $250,000 had been expended prior to the commencement of this suit, and prior to the first of January, 1905; that a

large amount, not less than five million dollars, had been expended in the settlement and improvement of the said Imperial Valley, and that the value of the property dependent upon the said waters from the said canals for irrigation and domestic uses for the inhabitants thereof was of a value exceeding ten million dollars, and which property would be rendered worthless without the use of the waters from the Colorado river; and alleged that there is no other source from which the people of that section of the country can be supplied with water, either for domestic uses or irrigation of their lands. And they alleged that they are dependent upon the waters of the Colorado river, and also upon the canals of the defendant.

Tr. page 120.

It was alleged that since the floods began in the Imperial Valley, in the effort to protect the settlers of the valley and the works of the plaintiff, and the property in that district, from injury by the said floods, the defendant had expended, or caused to be expended, a large amount of money, to-wit, more than half a million dollars, and that it was still engaged in the expenditure of money to prevent the overflows from the said river, and that after the defendant had succeeded in closing the break made through the said canals, and turning the Colorado river back into its natural channel in the fall of 1906, another flood occurred in the Colorado river, overflowing the banks of the said river on the western side southerly from the lower of the said intakes, and again discharging enormous quantities of water, near-

ly the entire Colorado river, into the district of land south of the said canals, and from which a large portion thereof had entered the Salton Sink. And that the defendant had been engaged, and was still engaged, in the expenditure of large sums of money to exclude the flood waters and to confine the said river again within its natural channel. And it is alleged that it had not been, by any act or omission, or any negligence on the part of the defendant, that the said floods had filled the Salton Sink and made the Salton lake therein, but that the same had been caused by the enormous and frequent and long continued floods of the Colorado river, and that such floods could not have been foreseen and provided against.

Tr. pages 120 and 121.

Such were the issues made by the pleadings, and upon which the cause was heard.

But for a better understanding of the various questions which arose in this case, and are now here for determination, we think it proper to enter into a little further amplification of many of the main facts upon which this controversy depends. And we may say here, that as voluminous as this record is, no inconsiderable part of it consists of the description of conditions and the statement of former and existing facts, about which there is no controversy between the parties, and no conflict in the evidence.

The section of country through which this main canal runs, is a vast area of many hundreds of square miles. And as we approach the section known as Imperial Valley, there is a vast amount of lands which, with ir-

rigation, are susceptible of cultivation, and are exceedingly fertile and productive. This area, while described in the answer as about 400,000 acres, is in fact nearer a million. The 400,000 acres refer particularly to the tract of country which is known as Imperial Valley, and even as to that, it is understated.

This land is, in a great measure, in its natural state, practically a desert. The soil is of an exceedingly sandy character, capable of great absorption, and the climate itself one of the most arid in the United States, if not in the world.

Evaporation in that tract of country, under ordinary circumstances, is enormous, and the absorption of water flowing upon the surface of the ground is also great indeed. The Salton Sink at its lowest depth is about 280 feet below the level of the sea, and the Salton basin properly so-called, and as distinguished from the Imperial Valley and its irrigable lands, is barren of everything except that now it is covered with water.

The New Liverpool Salt Works were situated at the northwesterly end of this valley. The canals conducting the water from the west bank of the Colorado river approaches the Imperial Valley at its southeasterly end; the main canal from the Colorado river to the boundary line between the United States and Mexico is about 45 or 50 miles in length, and the canals by which the water is taken and conducted to the place of use, extend, at their furthest extremity, about 40 miles further north.

The New Liverpool Salt Works are situated about 45 miles from the extreme northern portion of the irrigable lands. The Imperial Valley is 25 or 30 miles in width.

The New Liverpool Salt Company's buildings at the northwest extremity of the lake are at an altitude of about 3 feet above the elevation of the lowest point in the Salton Sink, but it is about five miles distant from that lowest point, so that the difference in elevation over a distance of five miles is only about three feet, from which it will be seen that this Salton Basin is a shallow saucer, with an inclination or grade not perceptible to the eye, and measureable only by water levels. And while away from this Salton Sink proper, the inclination is greater, yet from the crest or sea level to the lowest depth of the lake, a distance probably of 75 or 80 miles, the difference in elevation is only about 280 feet. The land, therefore, has no very great grade at any place, at least not extending for any considerable distance.

The losses by evaporation and seepage of waters flowing from the natural surface of this land, and in a climate such as characterizes that country, is something enormous.

The Colorado river overflows every year. From the evidence in this case it will be seen that there has never one year rolled by without overflows from the Colorado river with the possible exception of the year 1888. Every other year the records show that the Colorado river has overflowed its banks on the western side, but never but once in the history of the country, or in its traditions has there been any Salton Sink formed except once, and that in the year 1891. At that time a lake was formed about

five feet in depth, and covering an area of about 120 or 130 square miles.

Testimony of George W. Durbrow, Tr. Vol. II, pp. 641 and 642.

Durbrow makes the area 360 sq. miles, but this is too great.

Furthermore, there are innumerable sloughs or points of overflow along the western bank of the Colorado river, and these floods have formed channels cutting through that country in various directions and to various points, and among them is the channel known as the Alamo river.

There is also a wash from these overflows which runs into a lake 20 or 30 miles further south, known as Volcano lake. This lake's discharge is from the southern end towards the Gulf of California until the water reaches a certain height in Volcano lake, when it spills out over to the north side, and this overflow from the northern end of Volcano lake has washed out another channel which is known as New river, and which runs northerly towards and into the Salton Sink. The Alamo wash is another which also has its trend towards and extends to the Salton Sink.

These and other channels, some of which will be noticed further along, have been made by the overflows of the Colorado river, and whose existence has been known many years prior to the construction of this canal, or the cutting of any of these intakes.

There was no canal connecting with the Colorado river when the flood of 1891 occurred and made this lake to which we have referred before.

The ordinary seasons of the overflow of the Colorado river is in the summertime, or rather, during the months of May, June, July and August.

At the Yuma bridge there is constructed a gauge which measures the height of the water of the Colorado river at that point, and which gauge plays an important part in the evidence in this suit, as it is agreed that some point on that gauge marks the point of the flow at the Yuma bridge at which the overflows take place in the vicinity of these intakes.

These events, the flood of 1891, the existence of these various washes, the annual floods had occurred and been observed and their effects been observed for more than 30 years before the California Development Company began its operations in that section, and when it did begin, there was this Mexican company organized, which owned the lands lying below the International boundary. With this Mexican company the California Development Company had a contract in regard to the construction of the canals, and to which we shall refer further along.

The three intakes referred to in the pleadings in this case all extend to, and connect with, this channel known as the Alamo river, and which, as we have said before, has existed from the time whereof the memory of man runneth not to the contrary. And when this Alamo watercourse is reached, which is at about twelve miles west from the Colorado river and about where the canals and these three intakes come together, they each and every of them discharge when water flowed therein into this Alamo wash, and the Alamo watercourse or wash

is the canal herein complained of for a distance of about 40 miles.

Returning now to the contracts. There were introduced in evidence certain contracts printed and contained within a red book which was marked "Defendant's Exhibit No. 34." And also contracts between the California Development Company and the various Imperial water companies, marked exhibits 35, 36 and 37.

In the red book, defendant's exhibit No. 34, there are, besides the articles of incorporation of Imperial Water Company No. 1, and its by-laws, certain contracts set forth, one of which bears date the 6th of April, 1900, between the Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), (hereinafter called the Mexican company), and the Imperial Water Company No. 1; and the other dated the 24th day of July, 1901, between Imperial Water Company No. 1 and this Mexican company, and the California Development Company.

We call attention now, first, to the contract between the Mexican company and Imperial Water Company No. 1, and which is printed last in the book referred to.

It recites that, whereas, the first party (that is, the Mexican company), is about to construct a canal for the purpose of diverting certain waters of the Colorado river to be used for irrigation and other useful purposes, and is desirous of selling the right to use such water; and

Whereas, the second party is a corporation formed for the purpose of supplying water to its stockholders only upon certain lands situated in the county of San Diego * * * * * and within certain ex-

terior boundary lines mentioned and described in the articles of incorporation; and

Whereas, the second party is desirous of obtaining a supply of water for the use of its stockholders (then follows the agreement).

The Mexican company agreed to deliver to the Imperial Water Company, annually, four acre feet for each share of stock of the water company which may have been issued and located upon land situated within the boundaries of the lands to be supplied with water by the Imperial Water Company No. 1, provided that the aggregate which the Mexican company was obligated to deliver should not exceed 400,000 acre feet per annum.

The water was to be delivered at the point on the international boundary line between the United States and Mexico to be thereafter agreed upon.

And the Mexican company was to have no interest in, or control over, the water after delivery thereof at the international boundary line.

In consideration of this agreement upon the part of the Mexican company, the water company agreed that the Mexican company should have the exclusive right to sell the entire shares of capital stock of the said Imperial Water Company, and to retain all moneys received from such sales for its own use; the first 50,000 shares of stock sold should be at a price not exceeding $8.75 per share. (By the articles of incorporation of the Imperial company, it will be seen that its capital stock was a million dollars, divided into one hundred thousand shares of the par value of ten dollars each.)

It was further agreed that the second 50,000 shares

was to be sold at a price to be designated by the Imperial Water Company, but not less than $8.75 per share. All money received from the sale of the second 50,000 shares was to be paid to the Imperial Water Company. The first money received from the sale of the second 50,000 shares should be divided equally between the parties until the water company had received an amount equal to the amount for which said stock should have been sold in excess of $8.75 per share. The water company was to locate all stock upon the lands selected by the purchaser of the stock, or on the order of the Mexican company at the time of the sale, the stock, however, to be located within the exterior boundary lines of the lands to be irrigated by the Imperial Water Company No. 1.

The Imperial Water Company agreed to order and receive from the Mexican company one acre foot of water each year for each share of stock so sold and located; and agreed to pay to the Mexican company fifty cents for each acre foot delivered. The water company had the right to obtain from the Mexican company four acre feet per year for each share sold and located, but was bound to receive and pay for one acre foot for each share, the price of each acre foot to be fifty cents.

All water received by the water company prior to the 1st day of July of each year was to be paid for on the 1st day of July, and all other sums due for water each year should be paid on the 1st day of January of the following year.

The water company was to construct its own distributing system commencing the same at the point of delivery on the international boundary line, and the work

to be done at its own expense. The Mexican company had the right, at any time, to enlarge, at its own expense, any of the main canals of the Imperial Water Company No. 1, for the purpose of conveying water through the same to other lands, and that after such enlargement, the Imperial company should pay only its pro-rata of the expense of keeping the same in repair.

Such was the substance of this agreement.

The agreement of the 24th of July, 1901, between the Mexican company, the Imperial Water Company No. 1, and the California Development Company, referred to the contract of April 6, 1900, between the Imperial Water Company No. 1 and the Mexican company, and which agreement was annexed to the contract of July 24, 1901, marked exhibit A, and made a part thereof.

It then referred to a contract made on the 28th of December, 1900, whereby the California Development Company entered into an agreement with the Mexican company, in which the California Development Company agreed to deliver to the Mexican company a certain amount of water appropriated, owned and diverted, or to be in the future appropriated or diverted by the California Development Company, from the Colorado river, to enable the Mexican company to furnish water for irrigation of certain lands situated in Lower California, in the Republic of Mexico, and in the state of California, irrigable by gravity from a certain system of canals to be constructed by the C. D. company, by which agreement the Mexican company conveyed to the California Development Company its right to sell the entire capital stock of the Imperial Water Company No. 1.

This contract of December 28, 1900, is also annexed to the contract between the three parties, and marked exhibit B, and made a part of the contract of July 24, 1901.

This latter contract then recited that the California Development Company had sold a large amount of the capital stock of the Imperial Water Company, and had constructed a portion of the irrigation system contemplated in the contract exhibit B, and was then engaged in the further construction thereof.

Recited the fact that the waters conveyed to the Mexican company under the said contract exhibit B were the waters to be used by the Mexican company in supplying the Imperial Water Company with water under this agreement.

And after these recitals, and of the assessment of one dollar per share upon the stock of the Imperial Water Company No. 1, it was then agreed between the three parties that the contract of April 6, 1900, exhibit A, should be rescinded, but that the rescission was not in any way to affect any act which had been done by either of the parties thereto.

The Mexican company agreed, upon the demand of the water company, to perpetually deliver to it an amount of water not exceeding four acre feet of water per annum, for each outstanding share of stock of the Imperial Water Company, providing the aggregate was not to exceed 400,000 acre feet per annum.

It agreed to deliver the water to the Imperial Water Company No. 1 at the point upon the international boundary line where the main canal constructed by the Mexican company crosses the line, being a point distant about

2¼ miles easterly from monument No. 220 of said international line; and it was agreed that the Mexican company had no interest in, or control over, the said water after the delivery thereof at the said international boundary line.

The water company agreed that the California Development Company should retain all moneys or other property which might have been, or may be, received by it from the sale of the capital stock of the water company theretofore sold, and should have the exclusive right to sell all of the remainder of the capital stock except 2500 shares, upon such terms as it might desire, and receive for its sole use and benefit all moneys or other property that might be obtained therefor.

As to the 2500 shares of the capital stock of the Imperial Water Company No. 1, it should be retained by that company as treasury stock, and neither the Mexican company nor the California Development Company had any interest therein, or in the proceeds to be obtained from the sale thereof, and the stock so sold by the water company from time to time, as the second party might require, the proceeds of such sales to pay its running expenses, at the same price and upon the same terms that the California Development Company was selling its stock.

It was further agreed that the capital stock should be issued by its officers at such times and to such persons and in such amounts as the C. D. company should, from time to time, in writing request, until the entire capital stock of the second party should have been issued except as to the 2500 shares.

It was again agreed that the water company should receive and pay for, not less than one acre foot of water for each share of its stock outstanding upon the first day of July of each year, and pay to the Mexican company the sum of fifty cents per acre foot for each acre foot of water delivered, which was the price to be paid annually; and in no event and under no conditions was this price to be increased.

It was further agreed that the water received by the water company prior to the first of July, should be paid on that day, and all other sums on the first day of January following.

And it was provided that for a failure or default of the water company for a period of 90 days to make payments for water delivered after it became due, the Mexican company and the California Development Company, or either of them, might cease to deliver such water from the said main canal until such arrearage was fully paid.

The California Development Company agreed to construct and maintain a main canal, commencing at a point on the international boundary line where the water was to be delivered to the Imperial Water Company, and continuing from the point of commencement through the lands described in the articles of incorporation of Water Company No. 1, and to be of sufficient capacity, either in its original construction or through subsequent enlargements from time to time by the California Development Company at its own cost and expense, to convey an amount of water sufficient at all times for the irrigation of the lands owned or located by the stockholders of the water company, and of a capacity to carry at least four

acre feet of water per annum, for each outstanding share of stock of the water company.

The canal was to be owned and maintained by the California Development Company, which was to have the exclusive right to navigate the said canal, and to develop and use all power that might be developed from the waters flowing therein.

The California Development Company agreed to convey the water to be delivered by the Mexican company to the water company through said canal to the lateral ditches to be constructed by it as therein provided.

If the California Development Company failed to construct and maintain the canal system, and deliver the water to the lateral ditches to be constructed by the C. D. company, then the water company had the right to enter upon the canal and make such additions and repairs thereto, and changes therein, as were necessary in order that it should have a capacity sufficient for the conveyance of the water to be conveyed to it therein, and also had the right to convey the water through said canal from the international boundary line to the lateral ditches, and the cost of such additions and changes in said canal, and expense of conveying the water through the same would be a claim against the California Development Company.

The California Development Company further agreed to construct a system of distributing ditches, together with all necessary gates and water weirs for the water company, and in such manner as to convey the waters from said canal to a point upon each governmental subdivision of 160 acres of land from which it was practi-

cable to irrigate the same; with some further minor provisions not essential to the understanding of the relations between these different companies.

But each and all lateral ditches, as soon as completed by the California Development Company, were to be turned over to the water company, and thereafter owned, possessed and controlled and maintained by it.

The lateral ditches to be constructed where necessary to irrigate the lands owned or located by the stockholders, were to be either as originally constructed, or by subsequent enlargement, of ample size to convey to the stockholders of the Imperial Water Company No. 1, an amount of water equal to two-thirds of an acre foot per month for each share of stock owned by them, with provisions for refunding to a stockholder the moneys paid in case his land was so located that it could not be reached by gravity without going to too great an expense, and to take up the stock, which was to be assigned to the California Development Company.

To avoid the loss by seepage and evaporation, to the stockholder, it was agreed that the water should be measured, not at the international line, but at the point where the same was delivered from the main canal, so to be constructed by the California Development Company, into the main laterals of the water company, at which place the water company was to receive the full amount of water agreed to be furnished, and an additional two per cent.

The moneys collected from the assessment No. 1 were to be paid by the treasurer of the water company to the California Development Company, to be used by it in the

construction of these canals and laterals, or the California Development Company would, at the option of the stockholders, credit the stockholders with the amount of the assessment paid by them upon their obligation to the C. D. company last falling due, or issue receipts as thereinafter provided.

Provision was then made for issuing receipts.

By another provision, it was declared that the interest due from the stockholders of the water company to the California Development Company should not commence prior to January 1, 1902, and that no money would be collected from the water company for any water furnished prior to that time.

An acre foot of water was defined.

Passing now to exhibit B annexed to this contract, and which was between the California Development Company, the party of the first part, and the Mexican company, the party of the second part, it was recited that the party of the first part was the owner of a certain tract of land situated in the county of San Diego, (and which was particularly described), containing 318.51 acres, more or less, and that the C. D. company had appropriated and was the owner of a large amount of the waters of the Colorado river and engaged in the diversion of the water from that river upon the lands so owned by the California Development Company, and was engaged in the construction of headworks and a canal on said land for the purpose of diverting these waters, and in the construction of an irrigation system and system of canals whereby the waters of the Colorado river so diverted upon the said lands of the C. D. com-

pany described therein, might be used for the irrigation of lands in Lower California and in the state of California.

It was further recited that the Mexican company, the party of the second part, was the owner of a tract of land containing about 100,000 acres, situated in Lower California, a portion of which lay immediately south of the international boundary line, and the said boundary line was also a boundary line of the said tracts of land. That the system of canals so being constructed by the party of the first part crosses the said international line from a point upon the land owned by the California Development Company therein described, to a point on the lands owned by the Mexican company. That the proposed extension of said canals and irrigation system extends through and across the lands of the Mexican company in a generally southwesterly direction, and then in a generally northerly direction across the lands of the Mexican company, to various points upon the international boundary line, from which lands in California could be irrigated, and also extended to other points upon the land of the Mexican company from which its lands and other lands in Lower California might be irrigated.

Referred then to the contract between the Mexican company and the Imperial Water Company No. 1, of April 6, 1900, whereby the Mexican company had agreed to deliver to the Imperial Water Company No. 1, at a point on the international line, a certain amount of water;

That whereas the Mexican company contemplated en-

tering into additional contracts with other companies already formed or to be formed in the state of California, for the purpose of delivering to such water companies a large amount of water for the purpose of irrigating certain large tracts of land in California, and desired to obtain water for the purpose of complying with the contract entered into with Imperial Water Company No. 1, and to obtain water for the purpose of complying with the contracts proposed to be entered into with these other water companies, and also desired to obtain a supply of water for the purpose of irrigating the lands belonging to the Mexican company itself in the Republic of Mexico; and desired to obtain water for the purpose of furnishing waters for irrigation of other lands situated in Lower California.

Then recited the fact that under the contract already made, the Imperial Water Company No. 1 had granted to the Mexican company the right to sell all of its water stock, and that the Mexican company proposed to make similar contracts with other California corporations, then in consideration of the obligations imposed upon the Mexican company, the California Development Company, the party of the first part, agreed to build the system of canals from the point upon the lands of its own where the water was to be diverted from the Colorado river, to and across the international lines, and across the lands of the Mexican company in Lower California, to other points upon the international line from which large tracts of land situated in California could be irrigated; and also a system of canals from said point upon the Colorado river where the said water was to be di-

verted from which the lands of the Mexican company and other lands in Lower California could be irrigated.

The California Development Company agreed to perpetually deliver to the Mexican company a sufficient amount of the water so appropriated, owned and diverted, or to be in the future appropriated or diverted by the California Development Company from the Colorado river, to enable the Mexican company to furnish water for the irrigation of the lands situated in Lower California irrigable by gravity from the system of canals so to be constructed, and to be delivered by said system of canals to form an irrigation system, for the purpose of irrigating lands situated in California and in Lower California, and which agreement to deliver the said water was made dependent upon certain conditions, viz.:

1. No contract made or to be made, whereby the Mexican company agreed, or in the future should agree, to grant, transfer, deliver or in any manner convey the right to use any of the said waters, to any person or corporation should, by reason of priority in date or any other reason, give to such person or corporation any prior or superior right over any other person or corporation who should in any manner acquire from the Mexican company the right to use any part of said water.

2. The California Development Company should not be responsible for failure to deliver the water agreed to be delivered from any cause beyond its control, but it was to use due diligence in protecting the system of canals so to be constructed by it as aforesaid, and in restoring and maintaining the flow of water therein.

The Development Company agreed also to keep the canals so to be constructed by it in repair at its own cost and expense, and enlarge the same from time to time as might be necessary to enable it to comply with the provisions of the agreement. And in consideration of these obligations, the Mexican company granted, assigned and transferred to the Development company all right which it had in and to the stock of the Imperial Water Company No. 1, and all right which it had to receive any of the moneys which would be otherwise due and payable to it under the said contract with Imperial Water Company No. 1 from the sale of stock of said water company, and agreed also that it would make like assignments in the future of all rights which it might acquire under contracts similar to said contract with Imperial Water Company No. 1, which it might make with other water companies in the state of California, for the sale of stock of said companies, or the proceeds to be derived therefrom.

Ex. 34, Tr. Vol. VI, pp. 2270; for contracts therein;

Id. pp. 2284-2308.

Such is the substance of these agreements.

There were seven other water companies organized under the laws of the state of California, making eight all together, and being Imperial Water Companies Nos. 1 to 8.

It will be remembered, in the contracts already referred to, there is a limitation of Imperial Water Company No. 1 in the distribution of the water received by it, and by which limitation it is confined to certain district of lands. Now, each of these companies was organ-

ized in the same way, each had its own particular district in which the water to which it was entitled under these contracts was to be delivered and used.

A map was introduced in evidence, entitled, Map of the Imperial Settlement, showing the boundaries of the several mutual water companies, the systems of canals, etc., and marked upon this map were the boundaries of the different districts to which the several companies were limited.

Those districts were marked Imperial Water Company No. 1, its boundaries in brown; Imperial Water Company No. 4; Imperial Water Company No. 5, lying to the east of the Alamo river, marked in green; Imperial Water Company No. 6, lying to the west of the New river, and marked in red; Imperial Water Company No. 7, the boundaries marked in purple; and Imperial Water Company No. 8, marked in black.

This map is marked defendant's exhibit No. 33.

Tr. Vol. VII, page 2408.

The canal was begun in 1900, and connected with the Colorado river at a point about 100 yards above the international boundary line, and from this point to where it crosses into Mexico, the distance was about 1200 feet, and it was constructed to that point in October, 1900; there entered into Mexico, and some water was first obtained from it at what is now Calexico, in June, 1901.

Testimony of C. R. Rockwood, Tr. Vol. III, pages 1161 and 1162.

The water was brought down to the Mexican boundary line in the neighborhood of Calexico, and was, to that point, under the control of the Mexican company.

Id. Tr. Vol. III, page 1162.

And it was there delivered over to the mutual water companies.

These mutual water companies were all organized in the same way and had identically the same objects in view in every instance, and were organized to cover certain topographical districts with the idea in view that the appellant company, instead of being a retailer of water, delivering water to the individual users, became a wholesaler of water, and delivered water to the various districts.

Id. Tr. page 1163.

Imperial Water Company No. 3 never actively engaged in business at all at any time.

Of Imperial Water Company No. 2, some of its stock was issued, but it afterwards became merged into Water Company No. 4, so that at the time of the trial there was, in active existence, only six of these mutual water companies, numbered 1, 4, 5, 6, 7, and 8.

Testimony of Rockwood, Tr. Vol. III, page 1163.

Besides the contract with Imperial Water Company No. 4, there were introduced also the contracts with Nos. 4, 5, and 8, marked defendant's exhibits 35, 36 and 37.

And also No. 7, which was to be filed afterwards.

Tr. Vol. VI, p. 2308-2358.

The contract between the Mexican company and Imperial Water Company No. 8, and the California Development Company, refers to the contract of the 28th of December, 1900, between the Mexican company and the California Development Company, whereby the Development company agreed to deliver the water to the Mexican company as hereinbefore particularly set forth, and which contract was annexed to the contract with Water Company No. 8, marked exhibit A, and made a part of it, with all of its recitals and conditions. And by this contract the Mexican company agreed to deliver to Water Company No. 8, four acre feet of water for each share of its stock issued and located upon lands within its boundaries, the aggregate not to exceed 160,000 acre feet per annum, but it is in no essential particular different from the contract with Imperial Water Company No. 1.

The contract with Imperial Water Company No. 5 was made between that company and the California Development Company, and of date December 24, 1901.

This contract referred to a contract of the 15th of March, 1901, between the Mexican company and Imperial Water Company No. 5, which was similar to the contract between the Mexican company and Imperial Water Company No. 1. It recited the fact that the contract between the Mexican company and the Development company, of date December 28, 1900, by which the Mexican company had conveyed to the Development company the right to sell the entire capital stock of Imperial Water Company No. 5, had been entered into. And after many recitals of facts, it was then agreed by

the California Development Company that it would, at its cost and expense, forthwith contract and complete for the Imperial Water Company No. 5, a main canal from the point on the Salton river in San Diego county, distant about 12 miles north of the international boundary line, where the California Development Company had already begun the construction of a diverting dam, down to the lands upon which the stock of the Water Company No. 5 had already been located, and agreed to construct a system of distributing ditches with all necessary gates and water weirs to convey the waters from the canals to each governmental subdivision of 160 acres, etc. And in its main provision in regard to the furnishing of the water, the price to be paid therefor, it is substantially the same as the contracts hereinbefore already more particularly noticed.

It should be here stated that the persons who organized the California Development Company and launched the enterprise of the diversion of the waters from the Colorado river for the purpose of irrigation of Imperial Valley did, at the same time, contemplate a system of canals for the irrigation of the lands below the boundary line, and were in fact the purchasers of the 100,000 acres of land which belonged to the Mexican company; that under the laws of the Mexican Republic, as we understand it, foreign corporations were not permitted to hold lands, and the Mexican company was organized under the laws of the Republic of Mexico for the purpose of taking the title of the properties south of the boundary line, and did take the title of this 100,000 acres of land for the California Development Company, which

was the owner of the stock of the Mexican company with the exception of a few shares held by the directors of that Mexican company.

Now, in the light of these contracts and of the operations of the various companies, and the development of the various plans of the system, the plan of the system becomes quite obvious.

It was a gigantic enterprise for the settlement of tracts of land, mainly in California, partly in the Republic of Mexico, which were, in a state of nature, practically desert lands; that there was no source from which waters could be obtained for the Imperial Valley, nor probably for the lands south of the line, that would furnish an adequate supply, except the Colorado river.

The plan contemplated a canal capable of carrying a large volume of water, and to be conducted along the lines of gravity and crossing the boundary line between the two Republics near the town of Calexico, from which main canal waters could be furnished and distributed upon the lands below the boundary line, and also on those of the Imperial Valley; that to properly develop and complete a permanent system for the supply of settlers upon these lands in California, the organization of these Imperial water companies with their various numbers, was undertaken and accomplished, and at the outset of this enterprise and of its business it is undoubtedly true that the California Development Company did practically control the Mexican company and these Imperial water companies. But it will be noticed that these contracts provided for the sale of the stock of these mutual companies by the California Development Company

through its contract with the Mexican company, and this stock so sold was the evidence of the right of the holders thereof to be furnished with water to the extent provided in these contracts. The furnishing of the settlers, the stockholders themselves, and the distribution of the water to them, was through these Imperial water companies, and though, as said before, they were themselves controlled by the California Development Company at the outset, that was only because the California Development Company at the outset owned practically all the stock of each company, or at least controlled it, but as this stock was sold off, the power of the stockholders in the various companies was continually increasing, and that of the California Development Company diminishing, and at the time of the trial of this cause the stock of many of these companies had been sold off by the California Development Company until the controlling interest therein had passed into other hands. These other hands are the settlers themselves.

This stock was transferred to the settlers, ordinarily, on the basis of one share of stock for each acre of land owned by the individual settlers, and the water companies were to be furnished with water to the extent of four acre feet per annum for every share thus disposed of. And the stock so held by the settlers constituted the evidence and the measure of their rights to water from the distributing company.

But at the time of this trial, 98% of the stock of Imperial Water Company No. 1 had passed from the California Development Company into the hands of settlers, and it was then owned by them.

All of the stock of Imperial Water Company No. 4, and of No. 2 as well, which was consolidated with No. 4, has been sold to the settlers, all of the land in those districts having been taken up by the settlers who, at the time of the trial of this action, owned all of the stock of those companies.

As to the other companies, the stock had not all passed from the control of the California Development Company, and enough has been said to make it appear that while the Development company procured the incorporation of the mutual water companies, and virtually controlled those companies by its power over the stock, yet as the stock was sold, then the power of the California Development Company would grow less and less, until the control would pass into the hands of the settlers.

Tr. Vol. III, pages 1167, 1170 and 1173-1178.

And that control had passed into the hands of the settlers, and in some cases, as we have shown, the California Development Company no longer holds any stock in them.

In Imperial Water Company No. 1, it held only 2% at the time of this trial. And the board of directors is not the same, nor is the board of directors of the California Development Company, nor of the Mexican company, the same.

Such are the undisputed facts in this case concerning the inception of the enterprise, the plans which it had in view, and the methods by which those plans have been carried into effect so far as they are perfected.

Under these contracts, and in pursuance of this plan, and to supply the water, induce the settlement of these

lands, and to build up a great agricultural and horticultural settlement, the construction of the canal began in the year 1900.

C. R. Rockwood was the chief engineer of the company, although this canal was begun by George Chaffey under a contract with the California Development Company, of which Rockwood was one of the directors.

The enterprise had been conceived and its plan wrought out by C. R. Rockwood. When the first intake was cut by Chaffey, and the canal put in condition by which water could be conducted to the Imperial Valley, the settlements began, and the experiences which the company had had with these canals, and the intakes, had been that the main difficulty which they had to encounter was to prevent the intakes from filling up with silt, and with such rapidity that the water could not be delivered in sufficient quantities to the valley. The Colorado river probably carries more silt than any other river on the Continent of America. And in its flood seasons, and particularly when united with flood seasons of the Gila, the percentage of silt is enormous. And as the canals are constructed through a country of loose and porous material, they cannot be carried on a very heavy grade.

And because of the difficulty of keeping the silt out of the intakes, and to maintain the canal so that the water would flow in sufficient quantities, the second intake was cut after some two years' experience, or a little more, with the first intake.

But they had the same difficulty there, and the third

intake was cut in the fall of 1904, and completed about the middle of October of that year.

Tr. Vol. III, pages 1189, 1190 and 1198.

The California Development Company had, through C. R. Rockwood, made a thorough investigation of the conditions which might reasonably be expected to be encountered, and concerning the dangers which might be presented before they undertook the construction of the canal at all.

(Testimony of Rockwood, Tr. Vol. III, pages 1229, 1230 and 1233 to 1237.)

The Yuma gauge of the Southern Pacific Railroad Company had been itself established for 30 years or more.

Inquiry was made of various persons, including the oldest inhabitants. The result of those inquiries was that the Colorado river overflowed every year, and in the vicinity of these intakes; that the overflow waters had made these various channels which were found running in every direction through this country, and including the Alamo and New rivers.

The Yuma gauge marked about the height which the waters of the Colorado river reached at that point, and neither history nor tradition furnished any account of the formation of a lake or sea in this Salton Sink upon any other occasion than the flood of 1891.

When the first intake was constructed, headworks were put in, but the silting of the channel above those headworks soon made them absolutely useless, and a by-

pass was cut around in order to pass the water through there at all.

The character of the country we have already attempted to describe. And in that character and its climatic conditions, there was an amply sufficient explanation why it was that the waters did not gather in the Salton Sink. It was because seepage and evaporation were so enormous, and the distance so great, that notwithstanding the vast quantities of water which overflowed the banks of the Colorado river westward, and made its way in that direction, the waters pouring over this large surface and in this arid climate, and the soil peculiarly permeable to water, it disappeared before it reached the depths of the Salton Sink and formed a lake.

These conditions, and the past history of the country, and the experience of the California Development Company, were before Rockwood, the then chief engineer of the California Development Company, when he cut this new intake in 1904.

In the meantime, the settlement had grown; 100,000 acres were in cultivation, and the area was being extended, and a greater amount of water was necessary, or was reasonably supposed to be necessary, for the needs of the country.

Tr. Vol. III, pages 1194 and 1195.

These contracts with the various Imperial Water Companies had been made. The settlers had, to the extent of their settlement, taken the stock of these companies, and they were entitled to the waters under those contracts.

The floods of the latter part of 1904, and of the years

1905 and 1906, came, and they were such as were unknown, both in frequency and long continuation. And we call attention here to this fact, that while the New Liverpool Salt Company was contending, and contended successfully in the court below, that the loss of its property was due to the negligence of the California Development Company, it never made any attempt to refute the facts which we have just stated, viz., that nothing known in the history of that country, or in its traditions, was at all comparable to what occurred during the times of which we have just spoken.

Another fact upon which the evidence presents no conflict, the property claimed by the plaintiff, the entire salt plant, buildings, machinery and railroads, were utterly demolished, destroyed, every vestige of them buried up, we don't know how many feet under water before this trial concluded, and the last supplemental complaint was filed for the purpose of alleging this utter destruction.

During the progress of the trial, the plaintiff introduced evidence to establish the amount of its damages. Here again the evidence is all one way except such slight differences as may be found in the testimony of the witnesses for the plaintiff itself. The defendant offered no evidence upon this question of damages, nor was it at any time during the hearing of the cause, called upon to account for anything. The account was all made by the New Liverpool Salt Company, and consisted in an attempt to prove the amount of its loss by evidence concerning the value of the property destroyed, and its destruction. That value was sought to be proved by evidence concerning the cost of construction of the

buildings, and other things that were destroyed, and was of so uncertain and indefinite a nature, and proceeded upon lines which it is claimed by the defendant, were not the measure of the responsibility of the defendant, if responsible at all, and that the judgment, so far as the amount is concerned, is not supported by the evidence.

One item alone, but which was by far the largest of all, we refer to here in this statement of the facts out of which the various questions involved in this controversy arise.

The waters which overflowed the lands claimed by the plaintiff, dissolved the salt existing therein, and that salt is held in solution by those waters.

The testimony as to the amount of this salt in the crust, as it is termed, made by the plaintiff's witnesses, shows 1,500,000 tons, and it was valued, in the salt crust, at 25 cents a ton. And in making up the judgment of the court, that claim was allowed for the full amount, $375,000, which, of course, proceeded upon the theory that that salt was a total loss, absolutely destroyed forever.

As to the other items constituting damages decreed in this case, the objections to them are, that the evidence proceeded upon wrong theories, and even if correct in theory, was too indefinite to furnish any conclusion at all.

The questions involved in this cause, and arising out of the facts above set forth, are the following:

1. WAS THE DEMURRER TO THE BILL, FILED IN THIS CAUSE, PROPERLY OVERRULED?

2. Was the plaintiff entitled to an injunction at all, of any kind, and to what extent?

3. Was the plaintiff entitled to, and could the court grant, the injunction in this decree without bringing in the Imperial Water Companies, and each of them, in active operation, and the Mexican Company, as parties defendant herein?

4. If the Mexican Company could be dispensed with, were not the Imperial Water Companies necessary parties before any such injunctive relief could be granted?

5. Assuming the bill to be good as against a demurrer, was the decree for damages properly given under the evidence in the case?

6. Was the defendant guilty of negligence in the construction of its canals in omitting to provide means for controlling the flow of the water into the intakes?

7. If it was guilty of such negligence, was that negligence the proximate cause of the injury?

8. Assuming such negligence to have existed, did it contribute to the injury?

9. Was not the overflow and the formation of the Salton Sink, and the destruction of plaintiff's property, caused by the act of God, and not the negligence of the defendant?

10. If the defendant were negligent, and that negligence contributed in some degree to the loss, was the New Liverpool Salt Company entitled to

RECOVER OF THE DEFENDANT ANY DAMAGE BEYOND THAT CAUSED BY THE NEGLIGENCE OF THE DEFENDANT?

11. DID NOT THE COURT ERR IN GIVING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR DAMAGES, AND ALSO IN GIVING THE DECREE FOR THE INJUNCTION?

The assignment of errors will be found in the transcript, volume VI, pages 2371-2376.

The cause was argued before the court and submitted and afterwards decided by the court, and in delivering the opinion or conclusions at which the court had arrived, the specific points ruled were set forth by the learned judge. Those conclusions will be found in Transcript, volume I, pages 128-132. In the course of that opinion the court said, among other things, that the complainant was entitled to the compensatory relief claimed at the hearing and shown by the annexed summary of damages, omitting, however, the sums claimed for "railroad" and "loss of business." At page 132 that summary of damages will be found, and from the sum total are to be deducted the damages claimed for the railroad, $42,500.00, and the loss of business, $2,500.00, making a total of $45,000.00. These items were not allowed by the court and when deducted from the sum total will give the amount for which the judgment was entered in this cause.

The appellant now specifies the following particulars in which the decree in this cause is alleged to be erroneous and the errors relied upon and intended to be urged by the appellant.

1. The court erred in overruling the demurrer to the bill in this cause.

2. The court erred in deciding that the jurisdiction of the circuit court as a court of equity to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversions.

3. The court erred in deciding that neither the Mexican company nor the mutual water companies were necessary parties to the action.

4. The court erred in deciding that the said companies were organized by the defendant and are now acting as instrumentalities for effectuating the diversions complained of and should be considered for the purposes of this suit as identical with defendant or as mere agency corporations.

4. The court erred in deciding that even though they were to be considered separate and distinct companies and not agents, that they were joint tort-feasors and suit might be brought against one or more or all of them at complainant's election, and in deciding that there was no defect of parties therein.

5. The court erred in deciding that if when the suit was brought there were grounds for injunction, such grounds had not been removed by the destruction of complainant's works and by the closing of defendant's intakes.

6. The court erred in deciding that the complainant was entitled to have its free-hold protected under the evidence in this case without regard to the amount of damage threatened.

7. The court erred in deciding that the evidence did not show such resulting damage to the settlers in the Im-

perial country from the injunction as would justify its refusal if complainant were otherwise entitled to it.

8. The court erred in deciding that the waters which overflowed the complainant's land and destroyed its property were largely, if not entirely, the waters diverted from the Colorado river through defendant's intakes.

9. The court erred in deciding that the defendant was negligent in not selecting proper places for the intakes and in not providing suitable head gates to control the flow of water through the intakes.

10. The court erred in deciding that the defendant's said negligence was the direct and proximate cause of the overflow of complainant's lands and the resulting loss of its property.

11. The court erred in deciding that the floods of 1905 in the Colorado river would not have overflowed the banks of the river and submerged complainant's lands if the defendant's intakes had not existed.

12. The court erred in deciding that the complainant was entitled to the injunction in this cause.

13. The court erred in deciding that the complainant was entitled to the compensatory relief sued for.

14. The court erred in granting the injunction in this cause in the absence of the said Mexican company and the said several Imperial water companies, and the court erred in decreeing the injunction in this cause.

15. The court erred in granting the judgment for damages in this case because the evidence is insufficient to prove any damage to the complainant from any negligence of the defendant, or to justifying a judgment against the defendant for any damages.

16. The court erred in deciding that the flooding of the Salton Sink in the years 1904 and 1905 and 1906 and the destruction of the complainant's property was occasioned by the fault of the California Development Company or by any negligence of said company.

17. The court erred in deciding that the flooding of the Salton Basin with water and the destruction of the complainant's property occurred through the negligence of the defendant and not the act of God.

18. The court erred in deciding that the loss of salt destroyed at the mill and the destruction of the machinery of the complainant and the buildings of the complainant, resulted from the negligence of the defendant and not from the complainant's own negligence.

19. The court erred in giving a decree in this cause either for the injunction or the damages or any part of said damages.

20. The evidence in the cause was insufficient to prove the damages alleged and for which the judgment was given, or any item thereof, and the evidence in the cause is too uncertain to prove or establish any amount of damage suffered by the complainant.

21. The court erred in giving judgment in favor of the complainant for the sum of $456,746.23 because the complainant was not entitled to recover any damages at all in this suit.

22. If the complainant is entitled to recover damages at all the court erred in awarding damages up to the time of judgment.

23. The court erred in permitting the complainant to file the several supplemental bills herein.

BRIEF OF THE ARGUMENT.

I.

A. It is a rule of the federal courts that legal and equitable causes cannot be blended together in one suit in a Circuit Court of the United States, nor are equitable defenses permitted in an action of law.

Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 1064;
Scott v. Meely, 140 U. S. 106, 35 L. Ed. 358-360;
White v. Berry, 171 U. S. 366, 43 L. Ed. 199;
Cates v. Allen, 149 U. S. 451, 37 L. Ed. 804, 807-808;
Van Norden v. Morton, 99 U. S. 380, 25 L. Ed. 453;
Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569;
Mansfield v. Scott, 111 U. S. 386, 28 L. Ed. 465;
Cherokee Nation v. Southern Kansas Railway Company, 135 U. S. 641, 34 L. Ed. 295, 300.

The constitution of the United States secures the right of trial by jury in all actions at law where the amount in controversy exceeds twenty dollars ($20.00) and this right to a jury trial in a federal court cannot be defeated by blending legal and equitable claims.

U. S. v. Ingate, 48 Fed. 253, 256;
Eng. v. Russell, 71 Fed. 821, 824;
Harrison v. Farmers etc. Company, 94 Fed. 729.

When a suit, involving both legal and equitable remedies is brought in a state court and where the laws

of the state permit the joinder of such actions in one suit and the cause is removed to a federal court, the pleadings must be recast and the causes of action stated in accordance with the course of proceedings on the law and equity sides of the court respectively.

Perkins v. Hendryx, 23 Fed 418;
La Croix v. Lyons, 27 Fed. 403;
Jones v. Mutual Fidelity Company, 23 Fed. 506, 517;
In re Foley, 76 Fed. 390;
Fletcher v. Burt, 126 Fed. 619;
1 Beach Mod. Eq., Secs. 5-6.

And where there is a plain, adequate and complete remedy at law, the plaintiff must not only proceed at law because the defendant has a constitutional right to trial by jury, but even if the objection to the jurisdiction in equity of a national court is not made by demurrer, pleading or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize it at its own motion and give it effect.

India Land and Trust Company v. Shoenfelt (8 C. C. A.), 135 Fed. 484, 485-87.

B. The bill in this case does unite an action at law for damages with the bill in equity for an injunction. It will scarcely be denied that the complaint filed in the Superior Court of Riverside county sets forth a cause of action for damages [Transcript pages 7-13], and which is followed by an allegation that no provision had been made to control the flow of the water, and the defendant would, unless constrained by the court, continue to di-

vert from the Colorado river large quantities of water, which would naturally flow in another direction, so that the same would flood and overflow the lands of plaintiff and thereby destroy the property and business of plaintiff and occasion great and irreparable injury. [Complaint, paragraph 12, transcript, pages 13 and 14.] Then followed allegations concerning the damages already suffered with a prayer for an injunction and for a judgment in favor of plaintiff for the sum of eighty-seven thousand dollars ($87,000), *the damage already suffered as hereinbefore set forth in costs of suit, etc.* [Transcript, pages 15 and 16.] That this was an action for damages in the state court for injuries past and for an injunction against future injuries in the complaint framed in accordance with the practice in the state courts, is, we think, indisputable. While the admissions of counsel or their conduct cannot deprive a federal court of equity of jurisdiction any more than a consent could confer jurisdiction, is doubtless true, however that their action in this case shows that they themselves view the complaint in the state court exactly as we do, for when the cause came into this court, they, evidently under the belief that they were required to elect and to replead in the federal court, did file the bill herein and several supplemental bills [Transcript, volume 1, pages 61-72], to which bill a demurrer was filed. [Transcript, Vol. 1, pages 72-74.] This demurrer was overruled. [Transcript, Vol. 1, pages 75, 76 and 77.] On January 10th, 1906, the court granted the complainant leave to file the supplemental bill [Transcript, pages 78-79], and in that supplemental bill additional damages were

claimed. [Transcript, Vol. 1, pages 79-81.] The supplemental bill was demurred. [Transcript, Vol. 1, pages 81-84.] This demurrer was overruled. [Transcript, Vol. 1, pages 85, 86.] By the order permitting the said supplemental bill, it is recited that it was allowed against the objection of the solicitor for the defendant. [Transcript, Vol. 1, pages 78, 79.] An answer was filed to the bill and supplemental bill. [Transcript, Vol. 1, pages 87-99.] Subsequently the defendant was granted leave to file an amended and supplemental answer, which was filed December the 27th, 1906. [Transcript, Vol. 1, pages 102-123.] Afterwards leave was granted to the complainant to file a further supplemental bill. Defendants objected [Transcript, Vol. 1, pages 125, 126], and it was filed on the 19th day of December, 1907. [Transcript, Vol. 1, pages 126, 127.] Each of these supplemental bills, however, added nothing to change the character of the proceedings, but simply averred damages accruing subsequent to the filing of the previous bill and supplemental bill. Thus, it will be seen that the complainant did elect and proceed on the equity side of the court and filed its bill upon that theory. Now a comparison between the complaint in the Superior Court and the bill filed in the Circuit Court will show that they differ in nothing except that in the former court it called itself the plaintiff, in the United States Court "Your Orator," in the Superior Court it demanded damages, and in the Federal Court it prayed for an accounting. If in the state court the complaint united a suit in equity for an injunction with an action at law for damages, that character was not done away with by the bill filed in the Federal Court.

The distinction between legal and equitable actions cannot be defeated by mere names.

C. It is sought to rescue this bill from the demurrer upon the ground that the court having obtained jurisdiction in equity for the purposes of an injunction, may proceed to the relief which was actually given in this cause. The principle expressed sometimes, thus, that when a court of equity has acquired jurisdiction as such court of equity, it will determine the whole case and give whatever relief may be proper, both to avoid a multiplicity of suits or to the end that justice may not be done by piecemeal. If that be a sufficient reason here then that principle was equally applicable in the Superior Court of the county of Riverside, sitting as a court of equity, and a repleading or a recasting of the pleadings in the federal court was wholly unnecessary.

D. The bill cannot be sustained upon the theory that the compensatory relief was to be obtained through the medium of an accounting. There isn't an element of accounting in the case. Courts of equity to be sure have jurisdiction independently of other equitable grounds in suits for an accounting and it may make compensation in many cases where the jurisdiction does rest upon other grounds, though in the particular case an accounting might be one more particularly the subject of legal action, but the term "account" has a well settled legal distinction. It is a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relation. Equity has concurrent jurisdiction with courts of law in matters of account on three grounds.

1. Mutual accounts.

2. Dealings so complicated that they cannot be adjusted in a court of law.

3. The existence of a fiduciary relation between the parties.

In addition to these particular grounds of jurisdiction equity will grant discovery in cases of account on the general principles regulating discovery.

1 Bouvier's Law Dictionary, word "Account."

The foundations of equity jurisdiction in matters of account and illustrations of the exercise of that jurisdiction are fully considered and set forth in 1 Story's Eq. Jurisprudence, Secs. 442, 443, 446, 449, 450, 455, 457, 458, 509, 510, 513, 514a, 515-518a, 519, 520.

O. Pomeroy Eq. Jur. S. 178;

3rd *Id.*, Secs. 1420-1421;

Meres v. Chrisman *et al.*, 7 B. Monroe 422, 423;

Echols v. Hammon, 20 Miss. 177-178;

Fowle v. Laurason, 5th Peters 495,

in which Chief Justice Marshal said:

"That a court of chancery has jurisdiction in matters of account cannot be questioned; nor can it be doubted that this jurisdiction is often beneficially necessitated; but it can be admitted that a court of equity may take cognizance of every action for goods, wares and merchandise sold and delivered, or of money advanced where partial payments have been made, or of every contract, express or implied, consisting of various items on which different sums of money have become due and different payments have been made. Although the line

may not be drawn with absolute decision, yet it may be safely affirmed that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted."

See further upon the general questions herein involved:

Askew v. Myrick, 54 Ala. 30;
Stone v. Stone, 32 Conn. 142, 144;
Johnson v. Conn., Book 21 Conn. 148, 156;
Badger v. McNamara, 123 Miss. 117;
Vose v. Philbrook, Fed. cases No. 17010, Vol. 28, page 1293, particularly pages 1296-1297.

It is submitted that this bill cannot be sustained as one for an accounting, nor are these items of damage in the nature of an accounting, whether in an action at law or a suit in equity, founded upon an accounting. This suit is on the equity side only insofar as it is a suit for an injunction.

E. The sole ground upon which the right to railroad damages in this case can rest is upon the principle that having acquired jurisdiction for the purposes of an injunction the court will proceed to give complete relief and make compensation, no matter what may be the character of the compensation to be given. It is submitted that this ground fails here. The act of congress declares that a court of equity has no jurisdiction where there is an adequate remedy at law and the meaning of that term is defined to be that which is not in its nature or character fitted or adapted to the end in view.

Thompson v. Allen, 115 U. S. 554; 29 L. Ed. 472;

Rees v. Watertown, 19 Wall. 107; 22 L. Ed. 72;
Safe Deposit Etc. Company v. Anniston, 96 Fed. 663;
Van Wyck v. Knevals, 106 U. S. 360; 27 L. Ed. 201;
Southern Pacific Railroad Company v. Goodrich, 57 Fed. 879, 882;
Whitehead v. Shattuck, 138 U. S. 151, 34 L. Ed. 873;
Northern Pacific Railroad Company v. Amacker, C. C. A. 49 Fed. 537.

Under no head of chancery jurisdiction can a federal court sustain a bill to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law.

City of Parkersburg v. Brown, 106 U. S. 500, 27 L. Ed. 238;
Ambler v. Choteau, 107 U. S. 586, 27 L. Ed. 322;
City of Litchfield v Ballou, 114 U. S. 190, 29 L. Ed. 132;
Buzard v. Houston, 119 U. S. 352, 30 L. Ed. 451;
Zeringue v. Texas, etc. R. Co., 34 Federal 243.

If the wrong complained of can be adequately compensated by a pecuniary sum the remedy is at law and the injunction will not issue.

Wagner v. Drake, 31 Federal 849;
Hempsley v. Myers, 45 Fed. 287.

See also:

Mills v. Knapp, 39 Fed. 592;
Frey v. Willoughby (C. C. A.), 63 Fed. 865;

Thomas v. Council Bluffs Cannon Co., 92 Federal 424.

The constitutional right of a jury trial in an action at law cannot be defeated, avoided or evaded by merely linking an action at law with a suit in equity.

Jones v. Mutual Fidelity Company, 506, 517-519.

The principle, that courts of equity, having acquired jurisdiction, will proceed to do complete justice, is most frequently applied to accountings incidental to the complete determination of a suit in which the court has acquired jurisdiction upon some other grounds. The other grounds, too, are generally bills for a discovery and in order to entitle plaintiff to relief, which relief was obtainable by an action at law, the bill must be both for discovery and relief.

Cook v. Davis, 32 N. E. 176-177;
Patterson v. Glassmire, 31 Atl. 40.

In that case it was said, among other things:

"In this country it is generally accepted that a court of equity has power to decree compensation as incidental to other relief. * * * Not indeed as damages in the sense in which the law gives them, but as a substitute for damages. * * * By some the power is based upon the necessity of preventing a multiplicity of suits. * * * By others from the necessity of doing complete justice as between the parties. * * * And the rule above set forth is, of course, to be accepted with the qualification that a court of equity will not give both legal and equitable relief at the same time, or, in other words, decree the specific performance of the contract,

while at the same time giving damages such as will compensate for its permanent abrogation."

They refer to the case of Peltz v. Eichele, 62 Mo. 171; and then said the court:

"In the present case the circumstances are further complicated by the entrance of a third party in the field whose presence very probably contributed to plaintiff's loss, but in what measure cannot be ascertained. The amount by which the plaintiff's income fell short would accordingly be no measure of their damages; and in such case it would seem, recourse must be had to estimate defendant's profits. * * * This method is well recognized in equity, being based on the principle that a wrongdoer shall never profit by his own wrong; and the compensation is computed by the same rule that courts of equity apply to a trustee who has wrongfully used the trust property for his own advantage. * * * 'The court does not, by an account, accurately measure the damages sustained. * * * But, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits which he has made by his piracy, and gives them to the party who has been wronged.'"

31 Atl., page 43.

As illustrating the circumstances under which this doctrine is applied, see further:

Trammell v. Craddock, 13 So. 911-912;

Virginia & A. Mining & Mfg. Co. v. Hale, 9th So. 258.

See Stieffel v. New York Novelty Co., 43 N. Y. Sup. 1012, where the relief granted was obviously a mere incident to the general relief that was being sought, namely, the proper appropriation of the assets to the payment of creditors as required by the statute.

United States v. Guglard *et al.*, 79 Fed. 21, was a suit to enjoin the cutting of timber and where an accounting was taken for the timber, trees and wood which had already been cut and received by the defendants, and evidently proceeded upon that general principle that the wrongdoer, making a profit by his wrong, will be compelled to account for it.

Vicksburg & Yazoo Tele. Co. v. Citizens Tele. Co., 89 Am. State Rep. 656, 30 So. 725,

Is another case illustrative of the circumstances under which this rule is applied. There the court said, among other things:

"The ascertainment of these damages is a mere incident to the subject matter of equitable cognizance confirming the chancery jurisdiction, to-wit: the enforcement on the theory of a trust of complainant's equitable right to satisfaction out of the property of the Citizens Telephone Company in the hands of the Cumberland Telephone Company. It is that subject matter which gives the jurisdiction. The ascertainment and award of the damages is a mere incident in the exercise of that jurisdiction."

89 Am. St. Rep. 659.

In Brown v. Solary, 19 Southern 161, the lands in controversy were principally valuable for

their phosphates and the defendants had entered upon the land and were mining it for the phosphates and had taken phosphate from the soil, of great value, and an accounting was necessary to ascertain the amount. This principle is frequently applied in suits to recover mining property or for trespasses upon it and where the defendant has not only entered upon it but taken minerals therefrom.

Pierpont v. Fowle, 19 Fed. Cases, page 652, case 11152, and especially pages 654-655, where this doctrine is discussed and the principles upon which the rule is applied are considered. Among other things it is said:

"Hence it follows that a case will not always be allowed to go on in chancery merely because the power there is concurrent with that at law, but it must be fuller, more appropriate or better. * * * Some cases, cited to show that the United States courts here will proceed to sustain suits in equity, when the relief is entirely ample at law, rest upon a different principle when analyzed."

And again:

"Asking a discovery separately or with other matter was thus often, enough to give jurisdiction in chancery. * * * But *quaere*, unless the other matter was of a chancery character."

And again:

"My own impression is that from a strong fondness for a trial by jury, the common law and all its principles and forms, rather than those in equity, it was the design of our fathers, in that clause of the judiciary act, not to permit proceedings to go on in chancery, if it turned out

in the progress of the inquiry that full and adequate relief could be had at law, and therefore no necessity existed to go into chancery, or after being in to proceed further there."

19 Fed. Cases, page 656.

It is submitted that from these authorities it is not true that every bill filed in equity upon some well recognized head of equity jurisdiction can draw to that court as incidental to the relief, every sort of purely legal action that might also be involved in the controversy. But if the rule has any limitations at all, this case is clearly outside of the rule. If it be not, the rule of the state court that a suit in equity for an injunction may be coupled with an action at law for the damages already accrued, is equally the rule of federal practice and the recasting of the bill was unnecessary.

II.

The court erred in deciding that the jurisdiction of the Circuit Court, sitting as a court of equity, to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversion.

This question, of course, needs no separate consideration. An examination of the cases which we have already cited in support of the proposition that the bill was demurrable will show that it is not true that a bill in equity in the federal courts, bringing the case within the jurisdiction of that court, will draw to that jurisdiction

every sort of legal action or warrant every sort of legal relief as incidental to it. The cases all show that the legal relief must be of a kind similar to that over which equity has jurisdiction independently of any other kind. We do not mean that it must be the same. Thus, where a real account is to be taken, in order to give complete relief in equity, the court will proceed to take that account although the accounting itself in the particular instances might be such that a court of law would have jurisdiction, though perhaps equity would not take jurisdiction independently of other grounds, but it must be an actual accounting. So, too, as already stated, where, in addition to a legal wrong occasioning legal damages, the defendant has made some profit or taken to himself the property of the complainant, there the bill in equity to restrain further depredations gives jurisdiction to compel an accounting for that which the defendant has taken from the plaintiff. Cases, too, are numerous where in bills to restrain the infringement of a patent, the defendant may be called upon, in a court of equity, to account for the profits accruing to it by reason of the infringement. But it is not true that because a court of equity has acquired the jurisdiction upon some particular ground of equitable jurisdiction, that from thence to the end of the case all distinctions between law and equity are abrogated, and the court becomes a court of law as well as of equity.

III.

The court erred in deciding that neither the Mexican company nor the mutual water companies were necessary parties to the action.

The contracts between these companies have already been referred to. They are contained in the red book and in the Transcript, Vol. I, page 226-249, will be found the contents of the red book. The first is the agreement of July 24th, 1901, between the Mexican company and Imperial Water Company No. 1 and the California Development Company. This agreement referred to the contract of April 6, 1900, between the Mexican company and the Imperial Water Company No. 1 and which was annexed to it and made a part of it and marked exhibit A.

Trans. Vol. I, page 227.

It referred then to the contract between the California Development Company and the Mexican company, of date the 28th of December, 1900, and annexed that contract and made it exhibit B. It recited that the C. D. company had sold a large amount of the capital stock of the water company and had constructed a part of the irrigating system contemplated in the contract exhibit B and was engaged in the further construction thereof.

Trans. Vol. I, pages 227-228.

Recited that the waters conveyed to the Mexican company by the C. D. company under the contract exhibit B are the waters which were to be used by the water company.

Trans. Vol. I, page 228.

By that contract, in its first article, they rescinded the contract of April 6th, 1900, marked exhibit A. The rescission was not to affect any act which had been done by either of the parties under it. Second, there was to be delivered by the Mexican company to the water company four acre feet of water per annum for each outstanding share of stock of the Imperial Water Company No. 1, but not to exceed in all 400,000 acre feet.

Vol. I, page 228, Par. II.

The water was to be delivered at a point upon the International boundary line where the main canal crossed the line and being a point about 2¼ miles easterly from monument 220 of that boundary line, and after that delivery the first party had no interest in or control over the water.

Trans. Vol. I, pp. 228-229, Par. III.

There were then provisions for the sale of the capital stock by the C. D. company, except 2,500 shares, which was to be retained by the water company.

Trans. pages 229-230, Par. IV.

The water company was bound to receive and pay for at least one acre foot for each share of its stock outstanding each year. The price to be paid for water was 50 cents per acre foot annually, which amount was never to be increased.

Vol. I, page 230, Par. 5.

It was agreed that all water received by the water company prior to the 1st day of July of each year should be paid for on the 1st of July and all sums due for water

received after that were to be paid on the 1st day of January of the following year.

Trans. Vol. I, pp. 230-231, Par. 6.

The C. D. company agreed to construct and maintain the canal and of sufficient capacity to convey an amount of water sufficient at all times for the irrigation of the lands owned or located by the stockholders, and being an amount in the aggregate not less than sufficient to furnish four acre feet per annum for each outstanding share. The canal to be owned and maintained by the California Development Company, which had the exclusive right to navigate the canal and develop and use all power that might be developed in the waters flowing therein, and agreed to convey water to be delivered by the Mexican company to the water company through said canal to the lateral ditches to be constructed by it as thereinafter provided.

Trans. Vol. I, page 231, Par. 7.

If the California Development Company failed to construct or maintain the canal or deliver the water to be conveyed to it to the lateral ditches to be constructed by it, then the water company had the right to enter upon the canal and make such additions, etc.

The substance of this contract we have set forth before in the statement of facts and we call attention to the whole of the contracts as contained in the three papers referred to.

The agreement between the California Development

Company and Imperial Water Company No. 4 is set forth—

Trans. Vol. I, pp. 250-261.

And between the Mexican company and Imperial Water Company No. 6—

Trans. Vol. I, pp. 262-269.

And with Imperial Water Company No. 7, between the three companies, namely, the Mexican company, Imperial Water Company No. 7 and the California Development Company—

Trans. Vol. 1, pp. 269-285.

And it was shown in the testimony that all of the other contracts were substantially the same, and those to which we have last referred to are, so far as the present question is concerned, in substance the same.

While it is true that these companies and the Mexican company were organized by the stockholders of the California Development Company, still they never were either mere agencies of or identical with the California Development Company, or mere instrumentalities of that company and directed to the same end. It is true that the California Development Company was the corporation organized at the instance of Mr. C. R. Rockwood, who planned this enterprise, and its object was to take the waters of the Colorado river and conduct them into the Imperial Valley through the northern portion of Lower California and there to be used on both sides of the international boundary line, for irrigation, domestic and all other lawful purposes. The plan contemplated from the beginning was that so far as the Cali-

fornia Development Company was concerned, it was seeking its fortune or the fortune of the stockholders in the building up of a great canal system and for the diversion of waters and the sale or distribution thereof perpetually. To the success of this enterprise the colonization of these lands and the bringing of them under cultivation and the building up of a great settlement with all agencies and industries of modern civilization was, of course, essential. But the Mexican company was organized because a foreign corporation is not permitted by the Republic of Mexico to own lands, and one of the things which they were contemplating should be accomplished through the Mexican company, was the acquisition of about 100,000 acres lying immediately south of the boundary line and susceptible of irrigation by these waters. On the north side of the line the lands were almost entirely public lands of the United States and the California Development Company had to depend upon drawing to that section of the country settlers who were seeking homes. These Imperial water companies, 1 to 8, were all formed for the same purpose, namely that as lands were acquired, either the Mexican company or California Development Company, and after 1901, the latter, would sell the stock to these settlers and that stock would represent their right to water. Each share was entitled to four acre feet per annum and was bound to take one acre foot. Under this system the Imperial Valley did become a fertile section of the country and a large number of people settled there and did, at the time of this trial, number more than 10,000 and they had built up four or five towns, all dependent upon

water for irrigation from the Colorado river, and water for all other purposes from the same source, there being no other source of supply, and as this country settled up the stock was sold off to the settlers and in Imperial Water Company No. 1 ninety-eight per cent had been sold at the time of this trial. In some of them, the stock had all been sold; so that while in the beginning the California Development Company did, doubtless, have the power to control these Imperial water companies, yet that control was not the thing which they had in view and the influence of the California Development Company grew less and less as the stock was sold, until, when this case was tried, as to some of those companies, it had no voice whatever and in others, so little as to practically amount to nothing. Such were the conditions proven at this trial.

See Trans. Vol. III, pp. 1167, 1170, 1173 to 1178.

Leaving out of sight this present controversy, would anyone doubt that the position of the C. D. company and these various water companies and the Mexican company is really hostile? Suppose the California Development Company should fail or refuse to furnish to anyone of these water companies water on demand, which demand was within the limits of the contract rights, would not the water company have a right of action for damages or to sue for a specific performance or to obtain a writ of mandate to compel the furnishing of it? Would not the settlers on the lands sold or leased and now cultivated in Lower California on the Mexican company's lands have the same right? Would it be any defense, in any such action, for the California Develop-

ment Company to plead that it was enjoined from delivering the water or was only permitted to deliver it upon certain conditions and that those conditions might be violated by responding to the demand made upon it? It certainly would not. The water company, not being a party to the suit, is not affected by the injunction nor is the judgment either a bar to any sort of an action by it, nor would it be admissible in evidence against them.

Mr. Daniell says:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. * * * For this purpose, all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill, to have an opportunity afforded of making themselves active parties in the cause if they should think fit. In pointing out the application of this rule I shall consider it, firstly, with reference to those whose rights are concurrent with those of the party instituting the suit; secondly, with reference to those who are interested in resisting the plaintiff's claim.

"With respect to the first class, it is to be observed that it is required in all cases where a party comes to a court of equity to seek for that relief which the principles there acted upon entitled him to receive, that he should bring before the court all such parties as are necessary to enable it to do complete justice; and that

he should so far bind the rights of all persons interested in the subject matter as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again concerning the same matter either at law or in equity. For this purpose, formerly, it was necessary that he should bring regularly before the court, either as co-plaintiffs with himself, or as defendants, all persons so circumstanced that unless their rights were bound by the decree of the court, they might have caused future molestation or inconvenience to the party against whom the relief was sought."

1 Daniell's Chancery Pr., Perkins' Ed., top paging 245-246; Ch. V, mar. pp. 240-241.

In this case it is obvious that the injunction sought is really a mandatory injunction. It is not claimed that the case is such that the court ought not absolutely to restrain the diversion of the water from the Colorado river, but that it should not do so unless it constructed headworks for the control of the flow of that water, and though prohibitive in form, it was in fact mandatory.

Stewart v. Superior Court, 100 Cal. 543, 546-547.
Mark v. Superior Court, 129 Cal., 1, 5-7.

Now, another fact which appears in this case is that this intake No. 3 is on land belonging to the Mexican company and the canal itself extends a distance of thirty or forty miles on its lands.

Trans. Vol. III, pages 1158, 1161, 1162, 1184, 1200.
Maps, Vol. VII, page 2404.

Now, while undoubtedly a court of equity has the power to issue mandatory injunctions either preliminary or final, they are more loath to do so than to grant a merely prohibitive injunction. It has been said that mandatory injunctions are issued only in extraordinary cases whether the injunction sought is permanent or preliminary.

Gardner v. Strover, 89 Cal. 26.

But without regard to the form of the injunction, it is submitted that the presence of these water companies and the Mexican company, and certainly the former, was necessary to the granting of any injunction in this cause against the defendant. In support of this proposition we call attention to the following cases:

Consolidated Water Co. v. City of San Diego, 93 Fed. 849;

Lawyer v. Cipperly, 7 Paige's Ch. 281, 282;

Parrott v. Byers, 40 Cal. 614, 624;

Tyson v. Virginia & T. R. Co., Fed. Cas. No. 14; 321; 24 Fed. Cas. pp. 493, 495;

Berry v. Berry's Heirs, 3 T. B. Monroe, (Ky.) 263, 264-265;

Sweet's Heirs v. Biggs and Craig, 5 Littell (Ky.) 18;

Samis v. King, 40 Conn. 298;

Morse v. Machias Water Power and Mill Co., 42 Me. 119, 127-129;

Brandis v. Grissom, 60 N. E. 455;

Bradley v. Gilbert, 39 N. E. 593, 595;

Kussem v. Sanitary District of Chicago, 61 N. E. 544-553;

New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 31 N. Y. Supp. 1060, 1063-1064;
Jeffries-Basom v. Nation, 65 Pac. 226.

IV.

The court erred in deciding that the said water companies and the Mexican company were organized by this defendant and now acting as instrumentalities for effectuating the diversions complained of and should be considered for the purposes of this suit as identical with the defendant or as mere agency corporations.

The facts have been sufficiently presented upon which the correctness of this decision depends. Technically we do not see just how one corporation can organize another. The organization of other corporations is never, so far as we know, one of the purposes or objects, of any corporation, nor does the statute authorize such a thing. We suppose, however, the meaning here is that the same persons or same interests which organized the one caused the other to be organized and that is true here, but it does not at all follow that they become thereby identical or that either is to be regarded as a mere instrumentality of another or an agent of the others.

The Mexican company is the owner of land, the Imperial water companies corporations having the right to demand and receive from the California Development Company water to the extent of the contract rights and are engaged in the business of distributing water. The

California Development Company is the constructor of the canals and has diverted and appropriated the water and is engaged in furnishing the same to various companies in California and to others in Lower California for use and for a compensation or rate to be paid to it. They never were identical. They never had the same objects in view. While, as we have already stated, the business of both the Mexican company and Imperial Water Company was essential to the success of the C. D. company, that does not make them either identical with or agencies or instrumentalities of the California Development Company.

Even if the Mexican company and the C. D. company and the Imperial water companies had the same stockholders and directors, this does not make them identical nor one company the agent of the other. Nor does the fact that the stock of the Mexican company is owned by the California Development Company, mainly or even wholly, affect the question.

In Leavenworth v. Chicago, Etc. Ry. Co., 134 U. S., 688, 707, Justice Blatchford delivering the opinion, said:

"I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the powers of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could show that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of

the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, *the corporations were distinct corporations.* They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not, could they do these things, but have the relations of the parties—the trust relations, if indeed such existed—been abused to the serious injury of the Southwestern Company."

In Pauly v. Pauly, 107 Cal. 8, 19, the Supreme Court of California approved of this decision, and quoted the passage just set forth.

The case was approved, also, in San Diego v. Pacific Beach Company, 112 Cal. 53, 59, and this language was again quoted at page 59, and then the Supreme Court of California said:

"We will notice one or two other recent authorities to the same point. In Coe v. East etc. Ry. Co. 52 Fed. Rep. 543, Judge Pardee says: 'That the East & West Railroad Company could lawfully contract with the Cherokee Iron Works, although all the stockholders of the one were also stockholders of the other, in the absence of fraud and misrepresentation, is indisputable; nor would the fact that the two corporations had substantially the same directors, who were the active agents

negotiating the contract, render it void—at worst, only voidable, but subject to ratification.'"

On this same subject we also call attention to Coe v. East & W. R. Co., 52 Fed. 531-542-543.

In Cunningham v. City of Cleveland, 98 Fed. 657, 665, it is said:

"It is a fact that the incorporators of the Water & Electric Light Company were stockholders of the West, Virginia Company, but that circumstance does not show that one company was to be a mere cloak for another. It is a common plan to have a parent company engaged in a national business of installing local companies and having stock in the local companies, but they are distinct legal entities, and the interest of the larger company in the smaller is no reason for holding otherwise."

See also,

Phinizy v. Augusta R. Co., and
Central Trust Co. of New York v. Port Royal & W. Ry. Co., 62 Fed. 771, 773-774;
People v. American Bell Telephone Co., 22 N. E. 1057;
U. S. v. Telephone Co., 29 Fed. 17;
Commissioner v. Telephone Co., 18 Atl. 122.

From which latter case we quote this:

"For one person to supply the means to another to do business with, or on, is not the doing of that business by the former. Transactions such as the American Bell Telephone Company has had with the licensee corporations of Ohio, with its place of business in Boston and not elsewhere, are not the carrying on by it of business

in Ohio, nor are such licensee corporations its managing agents."

This doctrine was approved, and the above passage quoted, in People v. American Bell Telephone Co., 22 N. E. 1057, 1061, a decision of the New York Court of Appeals.

In Waycross Air Line Company v. Offerman R. Co., 35 S. E. 275, the court said:

"One person may own all of the stock of a corporation and still such individual shareholder and the corporation would in law be two separate and distinct persons." (Citing authorities.)

"One corporation may own all of the stock in another corporation, but notwithstanding this, the two corporations would not become merged, but would remain separate and distinct persons." (Citing authorities.) "It would necessarily follow from the rulings in the cases cited that two corporations would not become merged into each other merely because the stock in each was owned by the same persons. Therefore the contract made by the Southern Pine Company was not the contract of the Offerman Company, even if the stockholders in each were identical."

The cases cited are:

Manufacturing Co. v. White, 42 Ga. 148;
Exchange Bank of Macon v. Macon Const. Co., 25 S. E. 326;
Sparks v. Dunbar, 120 Ga. 129; 29 S. E. 295.

In Smith v. Ferries & C. H. Ry. Co., 51 Pac. 710, the dealings between two railroad corporations were in-

volved and called in question. And we call attention to what was said in that case.

51 Pac. 717.

We further cite on the same propositions:

Richmond Constr. Co. v. Richmond R. Co., 68 Fed. 105,

which case is approved in

United Mines v. Hatcher, 79 Fed. 517, 519.

The question is fully discussed in

Exchange Bank of Macon v. Macon Const. Co. (Ga.) 25 S. E. 326.

Corporations organized by the same individuals for the same object are not identical.

White v. Pecos Land Co., 45 S. W. 209;
Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812;
Williamson v. N. J. R. Co., 28 N. J. Eq. 277;
National Water Co. v. Kansas City, 78 Fed. 428;
Lange v. Burke, 69 Ark. 85;
Farm Etc. Co. v. Alta Co., 65 Pac. 22;
Atchison R. Co. v. Cochran, 43 Kans. 225;
East St. Louis R. Co. v. Jarvis, 92 Fed. 735;
Watson v. Bonfils, 116 Fed. 157;
Alabama Etc. Co. v. Chattanooga Co., 37 S. W. 1004;
Fisher v. Adams, 63 Fed. 674;
Cook on Corporations, 5th ed., pp. 1540-1541,

and the cases cited.

These cases treat of every phase in which this question has arisen. And the grounds upon which this point was ruled against us in the court below are not tenable.

IV-A.

The court erred in deciding that the suit could be maintained against this defendant as a joint tort-feasor.

The rule to which the court here refers is, we submit, a rule governing actions at law but not suits in equity. It is true that for a wrong done by several joint tort-feasors the person injured may bring an action against any one or more or all of them where the action is to recover damages for the wrong done. But this does not obviate the rule of which we have just been speaking, that in courts of equity it is necessary to make all persons parties whose presence is necessary to the complete determination of the cause and who may be bound by the judgment to the extent that the decree may be obeyed without danger of molestation from other parties who have an interest in the same matter.

The converse of this is also true. That is, where several wrongdoers, not acting in concert, are occasioning damage, the person injured may, in many instances at least, maintain a suit to enjoin them all, but he could not bring a joint action against them to recover the damages.

Foreman v. Boyle, 88 Cal. 290;
Churchill v. Lauer, 84 Cal. 233.

The foregoing discussion covers all of the grounds upon which the court in its opinion based the decision that neither these water companies nor the Mexican company was a necessary party to this suit in order to grant the injunction.

See Opinion, Transcript Vol. 1, page 128.

It is submitted that the decision cannot be sustained upon any of these grounds and that even though granting an injunction may have been proper in the case, the court erred in granting it in a suit against the California Development Company alone.

V.

The court erred in deciding that if when the suit was brought there were grounds for injunction, such grounds had not been removed by the destruction of complainant's works and by the closing of defendant's intakes.

It will be noticed that the court places this upon the proposition that the complainant is entitled to have its free-hold protected without regard to the amount of damage threatened. Otherwise the overflow sought to be abated might by a prescription ripen into a servitude upon the land. And further that the present safeguards against overflows might be temporary, while the complainant's remedial rights, if it has any, include permanent relief.

Conclusions of Court, Trans. Vol. I, p. 129, 3rd Paragraph.

Of course the court is not here considering the question of what would be the effect upon the right to any sort of relief, if the evidence showed that the plaintiff was never entitled to an injunction. But the court is proceeding upon the theory that notwithstanding the purposes of an injunction may have been in every other respect made unnecessary subsequent to the commence-

ment of the action, the court could still go on and grant an injunction for the protection of the free-hold. This is the question presented by the specification and we submit that upon this proposition, as every other, there is no universal rule of the character decided by the court, and whether that be correct or not must depend upon the circumstances of the different cases as they arise.

We call attention now briefly to the facts in this case, undisputed, as nearly all of them are, which, as it seems to us, show that the court erred in this particular. In the first place the evidence proves conclusively that the destruction of the property of the plaintiff was not wrought by the voluntary diversions made by the California Development Company, but on the other hand the same cataclysm which destroyed the property of the plaintiff was destructive of the property of the California Development Company. No matter whether the destruction was due originally to the negligence of defendant or not, still we say that the final result was not due to any voluntary act on the part of the California Development Company; but in truth, it exhausted its own resources in the attempt to shut the water out of the canal;—in other words, to do the very thing which the plaintiff was seeking to compel it to do, and finally accomplished it through the aid of others and large expenditures of money.

Trans. Vol. III, p. 1270 *et seq.*, Vol. IV, pp. 1611, 1612, 1617, 1618 *et seq.*

So far, then, as the command to build headworks by which the water was to be controlled, it was an accom-

plished fact nearly a year before the decree was given.

Trans. Vol. IV, page 1617.

So far as the lake was concerned, it was an accomplished fact and no injunction could affect it. The settlers in the Imperial Valley were numerous, the demands for water great, their properties exceedingly valuable and they would perish without the water. The lake covered an enormous area and extended a distance of forty-five miles southerly from the plaintiff's works, which were already destroyed. From an irrigating system so great as this, indeed from any irrigating system, some waste is necessary, and in one so enormous as this the waste must be quite considerable. The plaintiff's lands, as we have said, and its salt works, were overwhelmed with the flood and the waters are standing there to this day, seventy or eighty feet in depth in the deepest place. Enormous damage might accrue to the Imperial Valley, its land owners and cultivators of the soil and the towns and the various industries that have grown up therein. The court, in granting compensatory relief, had taken the estimate of the salt crust in the lands of the plaintiff, made by the complainant's own witnesses. It had been testified to be 1,500,000 tons. It was valued by the same witnesses at 25 cents a ton.

Testimony of Henton, Tr. Vol. II, pp. 625, 628;
Testimony of Sherman, Tr. II, p. 471.

This is one of the items allowed by the court in the summary of damages and is included under that title, "Salt Crust Destroyed $375,000."

That this land never had any value except for the salt

and the defendant was charged with that salt as a total loss and all the value which the land possessed was compensated for by that one item.

Trans. Vol. II, page 470 *et seq.*

The only other property that the plaintiff had upon the lands claimed by it was its buildings and machinery, its plant generally, including the railroad. For all this, except the railroad, the court awarded damages as for a total loss. Indeed, they had been completely destroyed and their value as determined by the court was allowed as a part of this compensatory relief.

We have then this conceded condition existing at the time this decree was given. The plaintiff's property was utterly destroyed. It had nothing left except merely the bare land which had been a salt bed and was valueless for any other purpose. It was awarded damages for that loss. On the other hand, the Imperial Valley was a flourishing settlement with more than 100,000 acres in cultivation absolutely dependent for its value upon the waters of the Colorado river and through this irrigation system of works. It had its towns, five in number.

Trans. Map. Vol. VII, page 2408.

And these and everything that pertained to municipal life was also dependent upon the waters of the Colorado river. The value of these properties amounted probably to more than ten millions of dollars and their very existence depended upon this water. Without it the destruction of the property of the Imperial Valley would be as complete from drouth as the plaintiff's property

was by the flood. The defendant had, at enormous cost, not only constructed the controlling headworks in the intake, but had been compelled, for the protection of the country against overflow, to build about sixteen miles of levee on the west bank of the Colorado river, all of which was completed before the trial ended.

Trans. Vol. IV, page 1630-1631.

The office of a writ of injunction, as its name implies, is a preventive, not a remedial one; it is to restrain the wrongdoer, not to punish him after the wrong has been done, or to compel him to undo it.

Stewart v. Superior Court, 100 Cal. 543, 546-547.

Preliminary injunctions will not be retained where it appears that the acts, the performance of which is sought to be restrained, have been performed before the order for the injunction is made or served.

Gardner v. Strover, 81 Cal. 148, 151;

Clark v. Willett, 35 Cal. 534, 547-549;

Pensacola, etc. R. Co. v. Spratt, 91 Am. Dec. 747, 750;

McCurdy v. City of Lawrence, 57 Pac. 1057.

In that case, among other things, the court said:

"At the final hearing of the case in the District Court it appears that all the things sought to be prevented by said action had actually been done. As said by the Supreme Court in City of Alma v. Loehr, 23 Kansas, 368, 22 Pac. 424; the exclusive function of a writ of injunc-

tion is to afford only preventive relief. It is powerless to correct wrongs or injuries already committed."

Street Ry. Co. of East Saginaw v. Wildeman, 25 Northwestern, 193, 194;

Carlin v. Wolf, 51 S. W. 679;

Same case, 55 S. W. 444;

Barney v. City of New York, 82 N. Y. Sup. 124;

U. S. v. La Compagnie Francaise Des Cables Telegraphiques, *et al.*, 77 Fed. 495, 496;

Baring, *et al.* v. Erdman, *et al.*, 2nd Fed. Cas., p. 784, Case No. 981, p. 790;

Cecil National Bank v. Thurber, 59 Fed. 913, 915.

A second principle which we here invoke is that injunctions will not be issued where the effect would be to defeat great enterprises or business in which a large number of people are interested.

McCarthy *et al.* v. Bunker Hill & Sullivan Min. & Coal Co., 147 Fed. 981, 984-985.

The doctrine of this case applies here. This court knows judicially that no system of irrigation was ever so complete that there was absolutely no waste of water, but here the water must flow from sixty to ninety miles before it reaches the point of use and it requires two or three days for it to reach the point of delivery into these canals from the place where it is diverted. Under such circumstances the immediate control is impossible and even after the control is exerted it is still two or three days before the water has passed away. In this decree the

defendant is enjoined from diverting from the Colorado river *any of the waters thereof* in excess of the substantial needs of the people dependent upon the canal described in complainant's bill of complaint for water supplied for domestic and irrigation uses and purposes and such other lawful purposes as the same may be applied to.

Tr. Vol. I, page 136.

Second, that the said water so diverted, whatever may be the amount, shall be so controlled and used that the same shall not flow upon the lands of the complainant described in the bill, etc.

Id.

Third, that the defendant be required to regulate the flow of any water that may be diverted by it so that there shall be *no waste water* flowing therefrom as the result of such diversion upon or over the lands of complainant above described.

Fourth, that defendant be restrained from turning out of its canals any waste water at any point where the same will naturally flow upon or over the lands of complainant or flow into the lake now covering the Salton Sink and thereby substantially increase the amount of water therein, or maintain the amount of water therein or prevent the decrease thereof by natural causes and that a writ of injunction be issued in accordance therewith.

Tr. Vol. I, pp. 136-137.

This injunction may doubtless be construed, and we think equally doubtless should be construed, in such

manner as not materially to interfere with the administration of the system. The learned judge of the Circuit Court has recently given an interpretation which we think is manifestly a correct interpretation of the injunction, yet nevertheless the presence of the injunction compels the administration of a great and growing system of water distribution under the menace of proceedings for a contempt. And it is plain that acts not amounting to carelessness in any employe of the company might nevertheless result in what the court would adjudge to be a violation of that injunction.

It will be noted that all water that is turned into the intake from the Colorado river at all naturally flows towards this Salton Sink. The difference in elevation between the point of the intake and the lowest depths of the Salton Basin will perhaps amount to 300 feet. No use can be made of the water so that it would not naturally flow towards this Salton Sink, and if enough of it, it would reach there. According to the estimate made at the trial of this cause, it will take at least ten years for that water to disappear by evaporation;

Tr. Vol. III, page 1144.

And no probability that it will evaporate in that time, for the lake is now nearly eighty feet in depth and covers an area of about 460 square miles.

While this latter fact does not appear in the testimony, yet it does appear as the government estimate of the area as made a few months ago, and of which we suppose this court will take judicial notice. The settlement of the Imperial Valley, as other lands of the United States, has been invited by the government of the

United States and the policy and the interest of both the United States and state governments are concerned in the maintenance of this settlement and in the encouragement of the still further extension of that settlement and of the cultivation of the soil thereof.

Of course, it is true that there is, on the other hand, the ownership by the complainant of certain lands and it holds that title in fee simple, and it is property, and though it be not of the value of a farthing, it is a property right and not unworthy of consideration. Yet the point here is that a complete and adequate remedy lies at law, and upon the question of an issuance of an injunction the mere existence of a title to property does not determine the question, but courts are influenced by the enormous damage that may accrue on the one hand and the insignificant and mere technical injury resulting on the other.

The granting of injunctions, whether permanent or preliminary, are, to a very considerable extent, matters of discretion, and that discretion should be exercised in favor of the party most likely to be injured or in favor of him who would suffer the greatest injury.

Page v. Aikens, 112 Cal., 401.

And the proof must be clear and convincing and the damage real and substantial.

Yarwood v. Michaud, 132 Cal., 204;
Fisher v. Feige, 137 Cal., 39;
Coleman v. Le Franc, 137 Cal., 214;
Real del Monte, etc. Mining Co. v. The Pond etc. Min. Co., 23 Cal., 83, 85.

It is submitted that upon these principles, even if the right to an injunction existed at the commencement of the action, it ought to have been denied on the final hearing. Though, as above stated, the learned judge of the Circuit Court has given such reasonable construction to the injunctive part of the decree as does, to a very considerable extent, obviate the objections to it, yet nevertheless it does not wholly relieve the appellant from the menace of contempt proceedings day by day in attempting to comply with its contract for the delivery of water and in the administration of its system, furthermore, the appellee has contended with great earnestness that the construction given is not the correct construction.

VI.

The court erred in deciding that the complainant was entitled to have its free-hold protected under the evidence in this case without regard to the amount of damage threatened.

This proposition decided by the court does not require a separate treatment, but we call attention of the court to certain thoughts that are necessarily involved in the court's expression of opinion upon that proposition. The language is this:

"Complainant is entitled to have its freehold protected without regard to the amount of the damage threatened. Otherwise the overflow sought to be abated might, by prescription, ripen into a servitude upon the land."

Tr. Vol. I, page 129.

First, if complete compensation is given for the full value of the land, there is no reason why the right should not accrue upon the payment of those damages. In other words, no reason why the judgment, coupled with satisfaction, should not operate as a condemnation of the property.

If an injury to the land is temporary the measure of recovery is the depreciation in the rental value of the land from the time of the injury.

Crab Tree Coal M. Co. v. Hamby's Admrs., 90 S. W. 226.

In an action for damages from overflow the rental and market value prior to the overflow may be shown.

Central of Georgia R. Co., v. Keyton, 41 So. 918.

Injury to land is considered as permanent when it is a continual one; when it is done at once by the unlawful act and negligent omission from which the loss results, without repetition of the act, there being but one act or one damage, though the latter may be composed of several items.

Masp v. Sapp, 55 S. E. 350.

In Hargreaves v. Kimberly, 53 Am. Rep. 121, the court, in the course of the opinion, said, among other things:

"In Thayer v. Brooks, 17 O. 489 * * * the action was for nuisance in diverting the water from the mill of the defendant in error and the court held that the rule of damages in an action for nuisance is the injury actually sustained at the commencement of the suit. In Blunt v. McCormick the court said: 'The rule

of damages laid down by the court was erroneous. In this action the plaintiff could only recover for injuries actually sustained before suit was brought and not for supposed prospective damages.' "

59 Am. Rep., page 122.

In a note to this case it is said that the most careful review ever made of this doctrine was by the New York Court of Appeals, Uline v. N. Y. Central R. R. Co., 4th N. E., 536. It was a case of a railroad crossing a street and raising the grade of the plaintiff's land. In the notes there are liberal extracts from the opinion in that case, and among other things, it is said, after saying that the right to recover damages existed:

"The question, however, still remains, what damages? Are her damages upon the assumption that the nuisance was to be permanent or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and thoroughly settled. There never has been in this state, before this case, the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of the courts; and it is the prevailing doctrine everywhere."

53 Am. Rep. 123-124.

In Troy v. Cheshire R. Co., 55 Am. Dec., 177, a suit for obstructing the highway, the court said:

"It is evident that a recovery in this action is a bar to any future action for this cause. In cases of nuisance the injury is of two kinds: 1. The direct injury caused by the act complained of, and; 2. The injury which may be afterwards occasioned by the unauthorized continuance of that cause. The declaration, in this case, alleges injury from the first construction of the railroad, and from its continuance to the date of the writ. The plaintiff can, in no event, recover for any cause of action not included in his writ; and on this ground, he can recover for no damage not sustained when his action is commenced. For any future damage he may recover in an action based upon a continuance of the injurious cause; and in such action it would be no answer to say that the damage now claimed has been recovered in a former suit because the writ in that case warrants a recovery only for damages sustained previous to its date. The principle for which the defendants contend is sound, and the only question which can arise here is as to the application of that principle. The damage done at the date of the writ is to be compensated, and that only. If that damage consists in the exposing of the party to expenditures of money, the test is not the time when those expenditures are made, for they may be paid at once or their payment delayed without, in any way, affecting the rights of the parties. The question is not, —When was the money paid—whether before or after suit; but was the liability to those expenditures occasioned by the acts complained of in the writ? Or was it by the continuance of the same acts or of the state of things produced by those acts, after the action was

brought? If they are the result and consequence of the wrongful acts complained of, they are to be recovered in that action. If they result, not from the wrongful acts, but from the wrongful continuance of the state of facts produced by those acts, they form the basis of a new action. There may, of course, be cases where it may be difficult to draw the line, but, it is apprehended, they will not be numerous. Wherever the nuisance is of such a character that its continuance is necessarily an injury and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means."

55 Am. Dec., pp. 186-188.

In the note in this case the court did not limit the damages to the date of the writ, and we say that it was not limited to the time of trial, but the case was treated as one of permanent nuisance, and damages given as for a total loss of the property; the court refused the item of "loss of business." Why? Because the court had taken their estimate of the whole amount of the property upon which this business was to be done and had taken their estimate of the value of it in that natural state, and had awarded them the whole sum thus determined. In other words, the whole value of the business was transacted and the profit of it decreed to the plaintiff. And in view of the fact that the plaintiff's land is worth

absolutely nothing, never having had any value except for the salt, it is submitted that an injunction ought not to have been given in this case, if the judgment of damages is correct in principle. The general rule is that damages are only recoverable up to the time of the commencement of the action.

Stincke *et al.* v. Bently *et al.*, 34 N. E. 97, 98-99;
Henry v. Ohio River Co., 21 S. E. 863, 866, 869;
Ready v. Mo. Ry. Co., 72 S. W. 142.

The same principle is decided and the court in its opinion, among other things, said:

"In this class of nuisances, where the cause of the injury may at any time cease by act of the party or intervention of the court, the rule of damage is not the whole difference in the value of the estate just prior and just after."

See page 143;

The Redemptorist v. Wenig, 29 Atl. 667, 668.

There it was said, among other things, that the rule allowing one to recover damages, past and future, is based upon the theory that the injury will be permanent.

Fossum v. Chicago M. & St. P. Ry. Co., 82 N. W. 979,

is strongly illustrative of the principles for which we here contend. There the railroad company had constructed a culvert in lieu of one formerly constructed and gave as the reason for it that the culvert, where previously located, was in such a place as to render the roadbed unsafe, and the court said if that were true, and it did render the operation of the railroad hazardous and it was

moved to the place where it then was for that reason and did render the use of the railroad property less dangerous than it was before then it was an injury of a permanent character, and the rule of damage is the depreciation or diminution of the value of the plaintiff's farm in consequence of it, and it is in this view that they regarded the evidence competent and material. The principle here is obvious. Having been charged with the difference in the value of the plaintiff's land, occasioned by the construction of this culvert it necessarily meant that the railroad could go on using the culvert. In other words, it was practically a condemnation of the property for that purpose. See also,

Rosenthal v. Taylor B. & H. Ry. Co., 15 S. W. 268.

We submit that it was error to give damages practically upon the theory that the plaintiff's free-hold was destroyed or permanently occupied by this nuisance and then enjoin the nuisance.

VII.

The court erred in deciding that the evidence did not show such resulting damage to the settlers in the Imperial country from the injunction as would justify its refusal if complainant were otherwise entitled to it.

This we need not discuss further. It may be admitted that under the operation of the injunction given, if construed to mean that the defendant may do whatever is necessary to supply the settlers of the valley with water

for all lawful purposes, it is possible to administer the system without any very frequent deviations from the meaning of the injunction. But accidents do arise in the operation of all systems and especially one of such magnitude as that of the defendant. And for many other reasons, as we have said before, the injunction is always a menace and the danger of proceedings for contempt very considerable, and in this case, unnecessary. Just what the damage to settlers might be, it would, of course, be impossible to determine since all the contingencies and vicissitudes attending the operation of this system cannot be foreseen, much less proven satisfactorily.

VIII.

The court erred in deciding that the waters which overflowed the complainant's land and destroyed its property were largely, if not entirely, the waters diverted from the Colorado river through defendant's intake.

One feature which might be properly included or involved in the decision of this proposition, namely, whether this injury occurred through the negligence of the defendant, we shall not here discuss, and have stated this specific error as one relied upon, for the reason that the word "diverted" does, in its general meaning, and especially as applied to such a subject, imply or include within it the idea of some active interference by the defendant in taking the waters of the Colorado river from their natural course and conveying them to the Imperial Valley.

The fact which we here call attention to is that when we come to the consideration of the evidence for other purposes, it will be seen that in so far as this may include the active interference with the waters of the Colorado river by the defendant, the decision is not correct.

The Alamo water course, made by ancient overflows, ante-dating all artificial works of any kind, was the result of overflows of the banks of the Colorado river through various depressions, greater or less, and which, making their way along the lines of gravity, the waters of these various overflowed places came together and from their confluence had made a wider water course, and which was known as the Alamo river. This Alamo river or wash, as we have before stated, constituted forty miles or more of the defendant's canal, but the defendant's canal had no more to do with the diversion of the waters from the Colorado river in times of overflow than had these natural depressions, nor was the effect any different, and, as we have said before, what the defendant was really engaged in when these floods were sweeping into the Imperial Valley, was in giving its utmost efforts to prevent it from flowing into its intake or overflowing the banks at all.

IX.

The court erred in deciding that defendant was negligent in not selecting proper places for the intakes and in not providing suitable headgates to control the flow of water through the intakes.

The principal witness for the complainant in this case was Mr. Duryea, Jr. His co-worker was Mr. Sherman. The California Development Company had made three intakes, one of which was made in the year 1900 and the beginning of 1901, and was the upper of the three; the second was made later and is the middle intake, and lower down the river; the third, in the fall of 1904, in October, and is the lower intake.

The first was about *1200 feet* above the Mexican boundary. The second and third lower down and below the boundary.

Duryea, Tr. Vol. I, page 302;
Rockwood, Tr. Vol. III, pages 1161 and 1162.

These intakes were all denounced by Duryea as having been made in improper places. The lower especially, one which admitted of carrying the water into Imperial Valley much quicker because more easily constructed, but unfitted by reason of the danger which threatened the Imperial Valley, or the plaintiff's works on account of it. In his mind the proper place was at a certain rocky point which was above all three of these intakes, and where the banks of the Colorado river, on the west side, presented a more formidable barrier to the water and a place where proper works controlling it might

more easily have been constructed, and the control of the water better assured.

Tr. Vol. I, pages 307-308.

His foresight in this particular instance was, to some extent, fortified by his hindsight, from the fact that ultimately the intake was cut in this rocky point and the successful turning of the water out by this intake no doubt had much to do with the determination in this cause. Mr. Duryea gave it as his opinion that the selection of these intakes, and each of them, was negligence, and for the reasons above stated.

Tr. Vol. I, pages 308 to 311 inc.

Sherman, of course, concurred.

It is respectfully submitted that the opinions of these gentlemen and the opinions of all other experts upon this subject were not admissible in evidence in this cause. An expert is not permitted to give an opinion upon the very point in the case to be decided. The question in this case was whether the defendant was negligent or not and the opinion of the expert was not competent upon that question. And especially, too, when it will be seen that all of the facts were before the court which the experts themselves knew, either personally or from hearsay, and from those facts the negligence was to be determined and though that negligence was in a sense a matter of opinion, yet it was the judicial opinion which was to determine it and not that of hydraulic engineers. And unless, from the facts which are established in this case, negligence is shown to exist, the opinion of these experts will

not make it exist, nor is their evidence competent for any such purpose.

Giraudi v. Elec. Imp. Co., 107 Cal. 120, 48 Am. St. 114;
Kerrigan v. Am. St. Ry. Co., 138 Cal. 506;
Hanley v. Cal. Bridge, etc., Co., 127 Cal. 232;
Lumans Golden Channel Min. Co., 140 Cal. 700.

We make the following quotation from Giraudi case, 48 Am. St. 118:

"The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witnesses from which the conclusion unavoidably follows."

Now for the evidence upon this proposition. We have stated the general facts quite fully, and as we have said before, they are undisputed: The enormous area of desert lands between the point of diversion and the New Liverpool salt works; the arid climate; the absence of rains; indeed, every feature of the country most favorable to the disposition of large quantities of water between the Colorado river and the New Liverpool salt works. In addition to that, past experience; the overflows of the Colorado river from time immemorial; the fact that there never was but one flood which materially affected the Salton Basin at all, and that in 1891, and under circumstances which we shall hereafter explain more particularly; the actual experiences of the defendant with these intakes.

At the first a headgate to control the waters was

placed. It soon became useless from the silting and it became necessary to cut a by-pass around this gate in order to get water through for the use of the settlers.

Rockwood, Tr. Vol. III, pages 1181, 1185 to 1188, 1190, 1194;
Sexsmith, Vol. III, page 914.

The intake itself became useless, which was the reason for cutting the second. The experience with the second was exactly the same.

Rockwood, Tr. Vol. III, page 1194;
Sexsmith, Tr. Vol. III, page 918, 919.

The third was cut, and in that also dredging had been necessary to clear away the silt before the floods came. As we have said before, all experience was that the trouble they were to have was to get water through the intakes and not to keep it out. In all previous experience, whenever they had occasion to turn the water out, they had done so without difficulty.

Follett, Tr. Vol. IV, p. 1517;
Rockwood, Tr. Vol. III, pages 1190, 1241;
Sexsmith, Tr. Vol. III, pages 915-917 incl.

Under the records of previous overflows and the experience with these intakes and the canal, it is submitted that the selection of them was not negligence.

Now, the fact, even if it were a fact, that the rocky point were a more suitable place for various reasons, that does not of itself make it negligence to select another. But now, for the purposes of safety, what advantage, pray, was the rocky point, and an intake at that place and headworks to control the flow of the water?

The rocky point has been there from the foundations of the world, so far as we know. It has always stood as an impervious barrier to the flow of the waters of the Colorado river and its elevation prevented the overflow on the surface. In other words, the rocky point itself was performing all the functions of the rocky point plus an intake with solid cement headworks to control the water. In spite of this fact, the Colorado river has overflowed its western banks along for miles below that rocky point, notwithstanding the presence of the rocky point. Can it be pretended that the presence of an intake with solid headworks would have had any tendency whatever to have prevented the waters of the Colorado river from overflowing below? It will be said that since the intake was constructed there the defendant has prevented the water from overflowing the country. The reasons are as plenty as blackberries.

(1) The floods ceased to come one on top of another as they had for two years before.

(2) The overflow of the river did not cease until the defendant had leveed its banks for eleven or twelve miles; without that levee the rocky point intake and the headgates would not and could not have had any effect whatever towards preventing the overflow.

It has been claimed that that which constituted principally the negligence of the defendant lay in the fact that by allowing the waters to flow in the intakes, the Alamo canal was washed out and the intakes were washed out, until the whole of the Colorado river at one time went through the Alamo river. How would that have been prevented by an intake at the rocky point

and the headworks there? The Alamo river, the New river, and divers other streams, as will appear in the record in this cause, had been made by just such floods of the Colorado river when there was no canal. The Alamo river had itself been cut to pieces prior to the time that there were any intakes. In the flood of 1891, the gentlemen who went on an exploration for the Southern Pacific Company, found this Alamo channel or water course, one day of one dimension and in a short time afterwards increased in its size nearly or quite four times.

E. L. Swaine, Tr. Vol. III, pages 874, 875 *et seq.*

It had cut out, both deepened and widened, in the meantime. Now, the cause of the 1891 flood was similar to those of 1905 and 1906, differing only in the degree. In the flood of 1891, the waters, in February, attained a higher point on the gauge than it did at any time in 1905 or 1906, or any other time.

In February, 1891, the Yuma gauge attained a height of 32 feet.

Tr. Vol. 1, page 163.

The waters which poured over in the flood of February were impounded by sand dunes and retained until the floods came later. In March the Yuma gauge attained a height of 23 feet.

Tr. Vol. I, page 163.

In April, 20 feet; in May, 25 feet; in June, 23; in July, 22.

Now, when the floods of the flood season came, the flood waters, united with the impounded lake, cut

through the sand banks and turned practically the contents of both floods into the Salton Sink at once. The bank of the Colorado river has been reported by the United States government to have been increasing at the rate of about an inch a year.

Follett, Tr. Vol. IV, page 1473;
Duryea, Tr. Vol. V, pp. 1941 and 1942.

The gauge height which marked the point of overflow in 1891 was stated by Mr. Duryea and Sherman to be 122 feet, or 22 feet on the Yuma gauge.

Tr. Vol. V, page 1941.

The same is taken as the height of overflow of 1891, by the engineers of the defendant, particularly Hawgood and Rockwood.

Rockwood, Tr. Vol. IV, pages 1548-9, 1551 to 1557;
Hawgood, Tr. Vol. III, pages 1120 and 1121 and 1122 and 1128.

Estimating the increase according to the results of the government observation, it was deemed in 1904, 13 inches, making the Yuma gauge height, in 1904, that marked the overflow, substantially 123.

Tr. Vol. III, pages 1120 *et seq.;*
Tr. Vol. IV, pages 1551 to 1557 and 1599 *et seq.;*
H. T. Corey, Tr. Vol. IV, pages 1630 for 1906 and 1907.

The floods which caused the havoc that produced this controversy began in January, 1904. It was shown, too, that when it is said that 22 in 1891 and 23 in 1905,

marked the point of overflow, it was meant the point of general overflow, and that in fact, the water was flowing over the west bank in many places of depressions before the gauge height reached 22 in one of those years or 23 in the other.

Hawgood's testimony, Tr. Vol. III, page 1151; Corey, Vol. IV, pages 1704, 5 and 6.

In Vol. VI of the transcript, page 2139, there will be found a complete record of the gauge heights in Yuma for the entire year of 1891. We have said that the greatest height which it attained in that month was 32 feet on the 27th of February. We think that somewhere it was testified that the 32 was a mistake and that it should be 33, but it will be seen from that table that the water ran from 28 on the 23rd; 25 on the 24th and 25th; 27 on the 26th to 32 or 3 on the 27th; 28 on the 28th; and that it remained above overflow point on March 1st and 2nd. In the same volume the gauge heights are given from 1891 to and including 1902, pages 2199-2210.

Then we have the reports of 1904 and 1905, in the printed volumes, to which we shall refer hereafter, and for the first 11 months of the year 1906, in Vol. VI of the evidence between pages 2267 and 2269, marked on the back 2268.

These tables we shall have to refer to again and pass them now, remarking only that, looking at those gauge heights alone, it will appear that if the original intake had been cut at the rocky point and an immovable headgate constructed therein, the result would not have been any different in any respect, in the years 1905 and 1906, from what it was.

Furthermore, the California Development Company had no reason to anticipate any such results as occurred from the construction of those intakes, and that it is not negligence to do anything where there is no reason to anticipate any such results as follow. The authorities upon this proposition we shall cite under another head.

X.

The court erred in deciding that the defendant's said negligence was the direct and proximate cause of the overflow of complainant's lands and the resulting loss of its property.

We shall not, under this head, enter into any extended discussion of this question, since the whole matter will more properly be considered under another. If what we say under the last point is correct, then the court did err in the matter just referred to. The Colorado river did overflow every year and it submerged the plaintiff's property on the occasion here referred to because there were such a succession of floods coming one upon the heels of another, in the years 1905 and 1906, as never occurred before in the world's history, so far as known, and that the quantity of water discharged by those floods, when compared with that of 1891, would have made an overflow of eight or ten times the water that poured into the Salton Sink in 1891, and we know that the Salton Sink attained an area that year of about 360 square miles.

Testimony of George W. Durbrow, Supt. of complainant company, Tr. Vol. II, page 642.

And was of a depth, in its deepest place, of about five feet, and that, measured by the due proportion, it is susceptible of a mathematical demonstration that the floods of 1904, '5 and '6, should have made a lake of anywhere from forty to sixty feet in depth in its deepest place, and would have submerged and utterly destroyed every particle of the plaintiff's property, if there had not been an intake of any kind on the Colorado river.

On the computation of the proportionate amount see testimony of Hawgood, Vol. III, pages 1120 *et seq.;* Corey, Vol. X, pages 170 *et seq.*; Follett, Vol. IV, pp. 1473 *et seq.;* J. D. Schuyler, Vol. III, pp. 1289 and 1290; C. R. Rockwood, Vol. III, pp. 1230 *et seq.*

These figures were gone over by Mr. Duryea, who testified that there was no objection to be made to the computation. The only doubt that he expressed was that he thought the overflow point was put too low, but he agreed to the fact that the increase of elevation on the bank of the Colorado river was about an inch a year.

Tr. Vol. V, pages 1853, 1857, 1935, 1941 to 1943 and 1964.

And he admitted that it would make no practical difference at what point the overflow really took place in 1891 and 1905, if you maintain the proportional height. In other words, if the point of overflow in 1891 was 24 feet instead of 22, still the proportional amount of flood water would be practically the same if you take 25 for 1904. However, it is submitted that the testimony is overwhelming that the overflow points assumed in this case are practically correct because there were many years in which there would have been no overflow at all,

or at least none worth speaking of, if we were to suppose these greater elevations to control, when we know that the overflow did take place.

XI.

The court erred in deciding that the floods of 1905 in the Colorado river would not have overflowed the banks of the river and submerged complainant's lands if the defendant's intakes had not existed.

We pass this point for the present, upon the proposition already presented.

XII & XIII.

The court erred in deciding that the complainant was entitled to the injunction in this cause and in deciding that the complainant was entitled to the compensatory relief sued for.

These questions have already been, to a considerable extent, discussed, and we shall present no further argument at this moment in support thereof.

XIV.

The court erred in granting the injunction in this cause in the absence of the Mexican company and the said several Imperial water companies and in decreeing the injunction in this action.

The principal point here involved is that these water companies and the Mexican company were necessary parties to the granting of such relief and it is submitted that under the facts proven in this cause, having refer-

ence especially to the contracts, that the court did err in this respect. These companies are not only independent companies, but the defendant company delivers water into the canals of the various water companies at different places, and from that moment has no control whatever over such canals, but from that time they are entirely under the control of the Imperial water companies and those water companies are not under the control of the defendant. Hence, if the defendant company delivers water to those companies in proper quantities, and no more than is necessary for use, some negligence or some action or inaction on the part of those companies may result in that water going to waste and flowing into the Salton Lake, a matter over which the defendant has no control, and for which it ought not to be punished for a contempt, and it is submitted that the relation of the parties are such that those companies would not be amenable to the process of contempt in this suit.

XV.

The court erred in granting the judgment for damages in this cause because the evidence is insufficient to prove any damage to the complainant from any negligence of the defendant or to justify a judgment against the defendant for any damages.

We shall cite the portions of the evidence relied upon under this point further along.

XVI.

The court erred in deciding that the flooding of the Salton sink, in the years 1904 and 1905 and 1906 and the destruction of the complainant's property, was occasioned by the fault of the California Development company, or by any negligence of said company.

This proposition we shall consider with the seventeenth specification, namely, that the destruction was wrought by the act of God.

The seventeenth specification is this: The court erred in deciding that the flooding of the Salton Basin with water and the destruction of the complainant's property occurred through the negligence of the defendant and was not the act of God.

In discussing this question we shall consider two different portions of the time. In the fall of 1904, and after the construction of the lower intake and after the flood season was over, the water began to appear in the Salton Sink. Mr. Drury, whose testimony begins Vol. II, page 558, says that he thinks he first observed the waters accumulating in the Salton Sink in November, 1904, about the middle, and at that time it had not approached nearer to the mills than two or three miles, and possibly as much as four or five miles. That they began to be apprehensive of danger as soon as the water reached the place where they were working and that was sometime in December. They were working on section 22 and the water was then about three and a half miles from the mills and machinery. That he thinks the water rose thereafter about one-half an inch a day perpendicu-

larly, and later increased. He thinks that sometime in December they began to be a little afraid and built a levee around the mills. Can't tell just when the water reached this levee; thinks the levee was built in December and the water reached that levee shortly afterwards and thinks that they abandoned it on March 10th because the whole thing was swamped. That was in 1905; and he thinks that the water first overflowed into the buildings and machinery on March 5th, 1905.

Tr. Vol. II, pages 600-603.

Now, it does not appear that any damage had been done to the property of the plaintiff during the year 1904, nor very distinctly that any damage was done, except to the salt crust, prior to March, 1905. But Mr. Drury informs us that the salt crust is never dry; that the water is usually from the surface to one or two inches below the surface; that the salt crust varies in depth from nothing to 18 inches on section 22.

Tr. Vol. V, pages 1964-1966.

He admits that during his experience at the salt works they have sometimes been interfered with in their operations as concerns drying the salt by reason of rains.

Id. 1966.

Mr. Drury produces a copy of the notes kept by him of the various events occurring as the waters rose.

Vol. V, pages 1967-1968.

And then gives us the dates from those notes. They will be found

Tr. Vol. V, pages 1968-1970.

October 31, 1904, water appeared about 4 or 5 miles from Salton; November 1st, about 1 mile from end of salt company's track; November 7th, water coming with a rush on section 34; November 14th, water reached and covered all of the salt to a depth of 3 inches; 15th, planned levee to protect mill and piles of salt; 21st, water 4 inches from rails of the company's railroad on the marsh; December 5th, water driven back by strong wind, leaving the salt uncovered except for dirt, silt and lime; track badly damaged. December 8th, telegraphed for sacks to use in protecting levee; December 20th, levee nearly completed; December 28th, levee, as originally planned, completed; January 6th, 1905, parties left Salton but sent back for boat. January 9th, water reached point about 600 or 700 feet from the mill. January 10th, 1905, Dovers and Sherman returned to Salton. January 11th, water at main levee. January 14th, water coming up on levee; 15th, telegraphed to rush pump; 16th, commenced to move salt; 19th, pump arrived and being installed; 24th—he does not complete the answer; and on February 7th the levee badly damaged. March 5th, levee broke and much salt destroyed. And so on until finally the buildings were entirely destroyed.

Vol. V, pages 1968-1970.

Turning now to the reports of the stream measurements published by the United States for the calendar year 1904, being Water Supply and Irrigation Paper No. 134, we find there reports of the Yuma gauge height for that year, pages 21-24, and all collected together on page 25. Assuming 23 feet as the overflow point, it will be seen that that height was first attained on May 20th,

1904, and continued above that point continuously down to and including July 15th. It did not again attain that height until August 24th and 25th and did not attain that height again that year. Therefore, a general overflow probably did not take place after the 15th of July, except on the said two days of August, but the overflow point had continued for a long time; and now we call attention to this fact, that while the overflow point is not reached, the gauge does not fall below 22 until August 5th, and then it is 21.95; and on the 6th, 21.85, and then goes above the 22 and hovers around that point, reaching 23 the two days in August referred to, and continuing through September and October and the first part of November, either at or above the 20 mark all the time, with the exception of but four or five days.

Now, Hawgood has said that the 23 mark marks the general overflow, but that water is overflowing through the low places of the Colorado bank before it reaches the 23; even in the year 1905, one of enormous floods, the gauge does not mark a uniform height so great in August, September, October, November and December, as it did in 1904.

Now, Rockwood has testified that no amount of water, wasted from the canals of the defendant, could have occasioned the influx or gathering of the waters of the Salton Basin in the fall of 1904.

Tr. Vol. III, pages 1212, 1215, 1216.

Duryea testified that 500 cubic feet per second wasted upon this extensive area of porous land would never have brought about the overflow in the Salton Sink.

Tr. Vol. V, pages 1926 *et seq.*

And from the testimony of Rockwood it was shown that no such quantity had been diverted during those months by means of this canal.

Tr. Vol. III, page 1212.

Furthermore, this canal was constructed in October, 1904, and had to be dredged out in order to get water through it before the fall season was over.

Rockwood, Tr. Vol. III, pages 1200 and 1201;
Sexsmith, Vol. III, page 921.

It was shown, moreover, that the fall of 1904 and the winter of 1905, was one of unusual rainfalls in that section of the country.

Tr. Vol. III, pages 1220 *et seq.*

That the season was unusually cool and the atmosphere unusually humid.

It was testified by Mr. Durbrow that a cloudburst in the summer of 1891 raised the lake in the Salton Basin that year two feet in depth [Tr. Vol. III, page 643], and there were many rains in the fall of 1904 and the early part of 1905.

Tr. Vol. II, page 643.

If we turn now to the testimony of Duryea and Sherman, and perhaps others, it will be found that they give it as their opinion that the waters which accumulated in the Salton Basin in the fall of 1904, probably came through the defendant's canal, and they seem somewhat more positive that the water came from the Colorado river.

Tr. Vol. II, pages 437 *et seq.*, 497, 507.

But it will also be seen that neither of them ever took the trouble to follow up the waters in their examinations and to determine with any degree of certainty where those waters did come from. [Tr. Vol. II, pages 487 *et seq.*] They do not appear to have made any examinations of their own or inquiries of others in regard to the rainfall during that period.

Observe the discharge measurements in second feet of the Colorado river in 1904, Water Supply & Irrigation Paper No. 134, pages 21-24. The last column on these pages shows these discharge measurements and will show the vast difference between the ordinary flow of the river and its flow during the flood seasons. And see particularly, on pages 23 and 24, the discharges after the flood season up to October 25th. On page 25 will be found, under the head of Estimated Monthly Discharge of Colorado River at Yuma, Arizona, for 1904, a summary of the maximum, minimum, mean and total in acre feet.

It will be observed that in the bill in this case the complainant alleges the diversion from the Colorado river of large amounts of water during this fall. The plaintiff undoubtedly took this from the reports of the stream measurements in 1904, to which we have referred, and they have relied apparently upon the table on page 28 of that report and of the title "Discharge Measurements of Imperial Canal at Heading in Mexico, Four Miles Below the International Boundary Line, New Gauging Station." Note that this is at the heading in Mexico and four miles below the international boundary line. On page 29 an explanation is given of what was done for the purpose of determining the *waste*.

"In October," says this report, "a canal known as canal No. 6 was completed, which enters the valley west of Calexico, California, and a station was constructed at this canal in November and weekly discharge measurements are being made. A large quantity of waste water was discharging from the Imperial Valley *below all irrigated lands, into the Salton Basin.* To determine this waste, discharge measurements were made on New river at Brawley, on Alamo channel at Rockwood, and on canal No. 5 at Bernice."

Report 1904, page 29.

Now, the first discharge measurements are given of the Holt canal near Calexico and that report is made in second feet, pages 29 and 30, and it will be seen that the greatest amount of waste discharge at any one time was 62 second feet, and it varied between 27 and 62.

On page 31 is given the discharge measurements of Hemlock canal near Calexico, and which amount, as will be seen, to little or nothing, running from 1.8 second feet to 14.5, but being less than 10 except on three different days.

And on page 32, for the months of July, August, September, October, November and December, it will be seen that for those months the discharge measurement never amounts to 2 second feet.

The next is the discharge measurement of the Alamo canal and it will be seen that from July 24th to the end of the year it varied from a minimum of 36.5 to a maximum of 256 second feet.

Same Report, page 33.

Discharge measurements of Alamitos canal, during the same period, never exceeded 36 second feet, and varied from 8.2 to 36.

Same Report, page 35.

The discharge measurements from the Imperial canal, near Calexico, are given at page 37, but that is not below the lands of irrigation, and besides that, the maximum there is 717 and measures the total flow. The discharge measurements of the boundary canal near Calexico will be found at page 39 and amount to very little.

The points mentioned on page 29 as being below the irrigated lands, and which constitute the waste, will be found at page 40. These are the discharges at Brawley, Rockwood and Bernice, the three points named on page 29, and from which it will be seen that the waste never amounts to 500 second feet. The first measurements are not complete, as Bernice is not included; but at Brawley (New river), 208 second feet; at Rockwood (Alamo), 43. For the month of October, the 18th and 19th, the sum total of waste was 502 second feet. The next sum total at the three points, 498, and so on, never attaining 500 at any time, except in the month of October, and then but two second feet over.

This marks the real waste from all these canals during that period, for these are the points which lie below the irrigated lands, and according to Duryea's testimony, a constant flow of 500 second feet would not have accounted for the waters in the Salton Sink in 1904.

In Water Supply and Irrigation Paper No. 177, at page 24, is given the portion of the Colorado river diverted by Imperial canal during 1904. The discharge

measurements made at the Imperial canal headings during 1905.

Id. page 23.

The daily gauge height at Yuma for 1905, is given—

Id. pages 15-16.

Now, taking the month of January, it will be seen that the overflow point is reached the first time on the 18th of January.

Id. page 15.

The water then stands high from that on until in February, and on the 8th of February it attains the height of 27.2; the next day, 28.75; the 10th, 26.6; the 11th, 24.1; then it falls below 23, but keeps well up the mark until on the 19th it attains 22.65; 24.9 on the 20th; 25.75 on the 21st; 25.85 on the 22nd; 23.55 on the 23rd. But without repeating these measurements, we call attention to the flood of 1905, beginning on January 18th, and it was just one flood after another until the summer overflow came, and during the months of February, March, April, May, June and July, down to the 10th, it was almost constantly above the general flood point. And in November it began again on the 29th, and it continued so to the 4th day of December.

We have the first ten months' gauge heights for 1906—

Tr. Vol. VI, p. 2268, Defendant's Exhibit No. 28.

Here again we find that on the 15th of March of that year the waters attained a gauge height of 26.20; on the 16th, 27.53; 17th, 25.50; 18th, 23.20. Falls below

the flood mark till the 27th, when the gauge height was 22.10, and does not fall below it till the 7th of April. In the flood seasons of May and June, indeed from the 25th day of April, until the 5th day of July, it was never below the flood mark.

In the same Vol. VI, are the reports of the gauge heights from 1891 to 1902.

Vol. VI, pp. 2199-2210.

While the notes do not show it, apparently, we are positive that the printed reports for the year 1903, were used on the trial of this action and the gauge heights at Yuma are shown in the volume for 1903, Water Supply and Irrigation Paper No. 100, from pages 20 to 24. And then are brought together, independent of the discharge, pages 24 and 25.

In the report for the year 1905, page 17, is given the yearly maximum and minimum gauge heights at Yuma from 1878 to 1905, and this table will become important a little farther along.

We have referred the court here to these tables to the end that we may not have need to refer to them any further, except to the report on the page last referred to, and we submit that upon the evidence in the cause the court was not justified in finding that the waters which accumulated in the Salton Basin in the fall of 1904 and preceding the flood of January 18th, 1905, was caused by the negligence of the defendant, or that the waters which there accumulated came from the canals of the defendant company at all. The daily gauge height at Yuma was sufficient to account for the overflow of waters in low places on the west bank of the Colorado

river for a long period of time, and much of which might have made its way into the sink. The rainfall had much to do with the accumulation of those waters. It was shown that the cultivators of the soil, ordering water for a particular day, and that water being delivered to them, found themselves unable to use it because the rain had just occurred, and these things and the little evaporation that took place because of the state of the atmosphere, was the explanation of these things, or at least upon this state of the evidence the court was not justified in concluding that it was the fault of the defendant.

Now, if, as we say, the uncontradicted evidence shows an abnormally long continued height of waters in the Colorado river, during the latter part of the summer and fall of 1904, though just below the overflow point, the unusual quantities of rain that fell in the surrounding mountains, the abnormally low temperature and humid atmosphere, and all concurring in that fall, were things which the defendant had no reason to anticipate, and, as we shall show by the authorities hereafter, one is not guilty of negligence in not anticipating things which are so unlikely that he has no reason to expect them or to provide against them.

And we remark generally here that the evidence was not sufficient to prove that any damage had occurred to the plaintiff's property prior to the floods of 1905, or, if any, to give any sufficient data upon which to estimate the amount of damage.

Passing now to the next period, beginning with the floods of 1905, which began on the 18th day of January.

It is submitted that there is no conflict in the evidence concerning the period between the 18th day of January, 1905, and the beginning of the year 1907. There was never anything like it seen in the world. The oldest inhabitants, who had known it from forty to fifty years, or more, have testified that they never saw any such conditions before and that there never were any such. The gauge heights show that there was nothing like it ever in any season before. Nobody pretends that any such succession of floods and long continued floods, one after another, ever did occur.

We here cite the volumes and pages where the testimony upon these facts may be seen.

Testimony of men, including steam boat captains, who have lived and worked on that river for many years.

Hall Hanlon, Vol. II, pages 853 *et seq.;* lived on the Colorado river for 55 years, page 853; remembers the flood of 1891, *id.*: Floods of 1904, 1905, 1906 unprecedented: "From the year 1854 until this time, neither I nor any man on earth has known a succession of floods of such magnitude as occurred in 1904, 1905, 1906." *Id.* page 855.

J. A. Mellon (steamboat captain), Tr. Vol. II, page 789.

Been engaged as steamboat captain on Colorado river since 1863, *id.* page 789:

"There has been three funny years down there. We have never had so much water below Yuma as we have in the last three years;" *id.* page 797; 1905 was the big flood; *id.* pages 799, 808, 809: "The floods just kept

coming one after the other. I have never seen such a condition since I have been there of the Gila coming up as it did that year, and last year and the present year: at no time during the whole time that I have been there. * * * If it did come up once a year that was all we would expect; but here it is coming up three times in a year one after the other. One don't pass by until there is another one right on its heels. By that I mean a flood.

"And such conditions as that I never have known in that section before and no person else. Mr. Hanlon has been there since 1854 and I warrant he has never seen anything like it. The Indians have not seen anything like it. I have asked them about it. The oldest Indian [*id.* pp. 812-813]. * * * Joseph S. Carter [Vol. 2, pp. 763, *et seq*]. Lived in that section for 20 years. Was there when the flood occurred in the Salton Sink in 1891. I went through to the Salton Sea in 1891. In June I think. Was with Mr. Harry Patton and a man by the name of Converse. Made the trip by boat [*id.* pp. 763-4] (describes trip made in that year, pp. 764 to 768 inc). Was there from 1860 to 1866 continuously. Saw the flood of 1862. We considered it a very large flood [*id.* p. 769]. Since 1891 and up to 1905 have observed the floods of the Colorado river constantly [*id.* p. 769]. None of the floods between 1891 and 1905 were as great as the flood of 1905. I have seen a good deal of high water, more in the last three years I seen more than I have seen before I think" [p. 778].

George C. Sexsmith, Vol. 3, p. 910, *et seq.*:

"I have been familiar with the Colorado river during

the winter seasons since 1893. [Tr. Vol. 3, p. 922.] There were greater floods in January, February and March, 1906, than I have ever known in the river since I have been there." [*Id.;* see also p. 931, also 934.]

Walter D. Smith, Tr. Vol. 3:

"The year 1891, if I remember, was the year that we had the great flood from Gila. That was the greatest flood that was known up to that time and my recollection is that its maximum was greater than the flood we had in 1905, but that it did not last near so long and that there was not the continuous high water in 1891 that there was in 1905, not nearly so continuous, and that the total volume did not amount to as large. Now that is my recollection. Of course the record will show that. That the total discharge during the year 1905 was greater, considerably greater, than in 1891. [Vol. III, p. 867.] In 1891 I think the flood measured 32 on the Yuma gauge. Of course that only lasted a day. It just went up to that, barely touched that and went right down. The regular annual flood in May and June, as I remember it in 1905, was unusually high and long, and in addition to that we had several rises. I think they were from the Gila and the Colorado both. We had several *unusual* rises in January, February, March and April, and had the summer floods in addition" [pp. 868-869].

C. R. Rockwood, Tr. Vol. III, pp. 1232 *et seq.*:

"I don't remember the exact number of distinct floods in 1905. My general recollection is that it was a year of floods, one coming after the other. We had unusually

high water for that season of the year in January. In February I know that we had very heavy floods, followed by heavy floods in March and very heavy floods in April. In May of course the water rose to the summer flood and continued in flood until July and then fell and rose again to the highest point reached in November. The highest point reached on the Yuma gauge since February, 1891. I have made a very careful study of the situation and of the floods of the Colorado river. From all information obtainable, not only now but previous to the exploitation I had made already during the exploitation of the canal proposition, I had made in 1892 and '93, and from no information that I have been able to obtain would it have been possible for me to justify myself in the belief that such a series of floods as happened in 1905 could have happened. The Colorado river proper, by which I mean that portion of the Colorado river which is fed by the drainage area above the Gila, is exceedingly regular in its rise and fall. There may be a very considerable difference in the height of the summer floods but it is very, very seldom that you find any fluctuation amounting to anything in the river, except during the summer rise. The Gila, which enters the river at the town of Yuma, seems to be somewhat more regular in its flood and we find from a study of the river and the records obtainable, that there is some danger of floods during the months of February and March from the Gila, but practically at no other season of the year except during the summer season. And I find in studying over the records and from the information obtainable, that where during the past 30 years there is one

year in which a flood of any moment could come down the Gila, there would probably be three years in which there would be no flood condition at all [p. 1234]. The only record that I have of a heavy flood coming down the Colorado was during the flood of February, 1891. A heavy flood had been coming down the Colorado at the same time that the flood came down the Gila [p. 1235]. From all the data I have been able to gather, I find no succession of floods such as that had during the year 1905. [Vol. IV, p. 350.] Conditions arose which I had no reason to believe could arise. A study of the history of the Colorado river would not lead me to believe that such a succession of floods could occur. If there had been but one flood of ordinary duration it would have done no harm. [Vol. IV, p. 1357.] I don't believe that the February flood of 1891 alone would have opened the intake so as to have caused any trouble." [*Id.*]

See also testimony on cross-examination, pp. 1390-91, *et seq.*

An examination of the record of the Yuma gauge and of the government records will show that the volume of water which came down the river in the years 1904, 1905, 1906 and 1907 was greater by many times than in any previous year. The volume in 1905 being very much greater than that in 1904, and 1906 being greater than that in 1905, and 1907 being greater than that of 1906. The history of the river shows that in the winter and spring whenever floods had occurred they consisted only of one flood wave going right up and right down, while the floods which came upon the management of the California Development Co. in the winter and spring of 1905

were a succession of flood waves following each other in such close succession that there would not be a subsidence of one before the other would be coming down the river. A single flood wave, that is, a flood of short duration, no matter how high the river rose, would not result in the eroding of the banks of the intake to any dangerous extent. It was only the succession or continued floods which no one had any right to expect in that season of the year that could cause any damage, and it was these continued floods of the winter and spring of 1905 that destroyed the successive attempts to close the intake and which resulted in the flooding of the lands of the complainant company.

We proceed now to present the legal principles bearing upon the question of the negligence of the defendant, and here let us say first, that the construction of this canal and cutting the intakes and diverting the water, with or without headworks, was the exercise of a legal right and the accomplishment of an enterprise encouraged by the laws both of the federal and state government, and these channels known as the Paradones and the Alamo, the latter of which, as we have before stated, constitutes the defendant's canal for many miles, and many other small and nameless channels had been made by the overflows of the waters of the Colorado river before anybody connected with the defendant knew anything of that section of the country. The means whereby overflow water came in sufficient quantities to reach the Salton Sink had been provided by the force of the Colorado floods and the laws of nature anterior to the construction of any canal or intake along the river. Ex-

perience had shown that with these means of approach to the Salton Sink, no flood of any extent had ever reached that sink except in the year 1891.

Now, when it is said that where damage is occasioned by the act of God, and if the act of man concurs with it to produce the injury, the man is still liable, it is always meant that the action or omission on the part of the person charged was itself negligence and that that negligence contributed directly to the result, and we contend here, first, that there was no negligence. Every person engaged in a work of this character is bound, of course, to foresee and provide against the ordinary perils of the country, which may reasonably be foreseen and anticipated; but is not bound to provide against unusual and extraordinary events such as have never been known to occur and could not have reasonably been foreseen by competence and skill.

A railroad company, in building a bridge over a stream, is bound to provide sufficient space for the passage of waters and also against such perils as arise from rainfalls known by experience to be incident to the particular section of the country, and which includes the ordinary floods, and such as, though rarely occurring, may reasonably be foreseen and anticipated.

Columbus, etc., Ry. Co. v. Bridges, 11th Am. St. 58;

Kansas City, M. & B. R. R. Co. v. Smith, 48 Am. St. 579.

In the latter case it was held that where the waters of the stream overflowed the country for a considerable distance, the waters thus pouring over a large extent of

country are surface waters and the railroad company is not limited in its rights and duties of making bridges across the channels of the streams, to streams of such character. The general proposition is that it is the duty of the railroad company to construct and maintain culverts sufficient to properly pass the waters of such floods as might be reasonably expected.

Sullens v. Chicago, etc., Ry. Co., 7th Am. St. 501, 505;

Emery v. Raleigh, etc., R. R. Co., 11th Am. St. 727;

De Baker v. Ry. Co., 106 Cal. 274.

But if the bridge is so constructed as to leave openings sufficient for the passage of water under circumstances reasonably to be anticipated, the railroad company is not liable to the land owners whose land was overflowed by an extraordinary flood, *though its obstruction of the stream aggravated the damage.*

Peoria, etc., R. Co. v. Barton, 38 Ill. App. 469, 470-473;

Piedmont, etc., Ry. Co. v. McKenzie, 24 Atl. 157-158.

The principles which govern railroad companies in these matters are simply the general principles applicable to all cases where the question of negligence of the character here claimed arises.

Furthermore, a defendant is not liable if the destruction would have happened though the works constructed by him had never been made, even though it may be said to have been negligence in him to have constructed the

particular work complained of. This is employed in the case last cited, and also, we think, in

Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 57 Fed. 441, 446.

It was there held that the railroad company is only required to exercise reasonable diligence and precaution, and is entitled to select a safe and massive structure in place of a lighter one which would less obstruct the water; that it is not liable to action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods. That if, after all precautions have been made, excluding the idea of negligence, the overwhelming power which is technically called the "act of God," intervenes and works injury, the party is not responsible.

In

Austin & N. W. Ry. Co. v. Anderson, 23 Am. St. Rep. 350,

the court below had told the jury, among other things, that if the embankments and culverts diverted the water from its usual course and contributed to the damage of the land and crops of the plaintiff, but it should appear that the damage was caused in part by water falling and running on the land regardless of the embankments and culverts, then the defendant would be liable only for such proportion of the injury as was caused by the embankment; and if the verdict should be for the plaintiff, it should be for only the damages occasioned by the embankments and culverts.

This instruction was approved by the Supreme Court.

Now, here in this case the evidence will show that the waters of the Colorado river overflowed their bank everywhere, above and below the intake of the defendant and that these surface waters were accumulating and flowing into these various water channels, including the Alamo and the New river. The canals of the defendant were never constructed for the purpose of accumulating and collecting the surface waters that might flow over the banks of the Colorado river and even if it were responsible at all, it would not have been responsible for the damage wrought by the overflow waters. The fact that they subsequently cut out the Alamo channel to such an extent that it carried pretty much the whole Colorado river does not make the defendant liable.

In

The Inhabitants of China v. Southwick, *et al.*, 12th Me. 238,

the court below had been requested to instruct the jury that if defendants' dam was instrumental in producing the injury complained of, they were liable, although the jury might believe that the wind also contributed thereto, and that if they were satisfied that if there had been no dam whatever where the defendants' dam was in 1831, the injury would not have happened, the defendants were, in that case, still liable for the injury. The court, however, instructed the jury that if the damage was occasioned by great rains or by the violence of the wind, the defendants were not liable, if the jury was satisfied that the head of water raised by defendants' dam in 1831 was not high enough to flow plaintiffs' bridge

or do damage thereto; the verdict was for the defendants.

Chief Justice Weston, in delivering the opinion of the court, said, among other things:

"The jury have found that the head of water raised by the defendants' dam was not, at the period complained of, high enough to flow the plaintiffs' bridge or do damage thereto. Its erection then was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind, super-added, might not have done the damage. It may have been one, then, of a series of causes, to which the injury may be indirectly ascribed. Their connection, however, was fortuitous and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years while the dam was higher than it was when the bridge was carried away. Such an event could not, therefore, have been reasonably calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which was attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence, the legal maxim, *causa propinqua non remota spectator.* This principle has been extensively applied in insurance

cases * * * and it is of great practical value in settling the rights and liabilities of contending parties. Were it departed from, it would open a field of litigation which might unexpectedly bring ruin to persons engaged in lawful pursuits. If there had been no dam the injury might not have happened; but the defendants had a right to erect it and that without being held responsible for remote and unforeseen consequences."

And see the quotation in that case from

Thompson v. Crocker *et al.*, 9 Pick. 59.

Every word of this applies here. Neither of the intakes was the cause of the successive and long continued floods of the Colorado beyond all precedent in the history of the country. It may be that the presence of that canal enabled the flood waters, by cutting it wider and deeper, to discharge a greater quantity of water in the Salton Basin than would have entered there but for the presence of the canal. Admit that to be true, yet the principle which is here decided shows that the defendant was not liable, even though the plaintiff's work would not have been damaged but for the presence of the canal.

Coleman v. Kansas City, St. Joseph & Council Bluffs R. R. Co., 36 Mo. App. 476,

fully sustains the principles for which we are contending. After referring to the instructions, *Id.*, page 481-483, Judge Ellison, delivering the opinion, said:

"Instruction No. 2 in effect directed the jury to find for plaintiff, notwithstanding the storm may have been unprecedented, if they believe that defendant's negligence concurred and combined with such extraordinary

storm in causing plaintiff's injury. It was in this respect misleading. It is perhaps taken from the language of the court in Pruitt v. R. R. Co., 62 Mo. 540. This is general language used in stating an abstract rule of law. Such abstract statements are dangerous material for an instruction. Negligence, even in case of carriers, must be a co-operative cause of the loss. * * * The rule as to carriers invokes a stricter principle of law than is applicable here. For the much greater reason, therefore, the negligence in a case like the present must have been such as to have effectually caused the destruction of the crops. It must have been an efficient cause though it need not have been the sole cause. When the act of God is the cause of a loss, it is not enough, under this rule of law, to show that defendant has been guilty of negligence. The case must go further and show that such negligence was an active agent in bringing about the loss, *without which agency the loss would not have occurred.*"

We invite attention to the whole case, but particularly 36 Mo. App., pp. 491-494. We quote, however, another passage from that opinion:

"For even though the dam and overflow would not have occurred at the railroad bridge, if there had been no pilings left there, defendant is still not liable unless the pilings would have caused a dam and overflow from *an ordinary storm.*" (Italics ours.)

We have shown in this case, by mathematical computations, that without any canal there, while the Salton Sink may not have been made a lake of seventy or eighty feet in depth, if there had been no canal there, yet from

the volume of water from those floods pouring over in such rapid succession, the Salton Basin would have been filled to a depth of forty or fifty feet and the plaintiff's property would have been thereby completely annihilated just as it was.

Testimony of Hawgood, Rockwood, Follett, Corey, and Schuyler, heretofore cited on this point.

Another alleged ground of negligence is the want of controlling works at the intake. What good would a controlling works have done? We are not left to conjecture here. The defendant did construct a cement headgate for the control of the water that did effectually shut the water out, but with what result? It overflowed the banks of the Colorado both above and below this headgate and this intake, cut its way again into the Alamo canal and swept on into the Salton Sink, notwithstanding this headgate stood firm as the rock of ages, and is, so far as we know, standing there to this day. It was here that it was learned that a headgate would do no good if the waters were left to overflow the banks everywhere and the levee was built to protect it against that overflow. The proof amounts to a demonstration that if there had been no canal at all, or being one, if there had been a headgate and controlling works which neither frost nor snow, nor thunder, nor earthquake, nor tempest, nor any other power known to man, could have moved, the destruction of the plaintiff's property would have resulted just the same.

In support of the same principle see

Proctor v. Jennings, 3d Am. Reps., 240, 242-245.

It is said that the past experience and records were such that the defendant should have anticipated such things as floods in the fall of 1904, and of January and February of 1905, and the others occurring out of the usual flood season of the Colorado. It is here that the published pamphlet for the year 1905, page 17, becomes important. The ground upon which this claim is made is this: That the maximum gauge heights in feet of the Colorado river is shown to have been four times attained in seasons of the year which were not the flood season. Referring to that page they will be seen to be the following:

1891, February 26th; 1895, January 25th; 1896, December 20th; 1905, September 22nd.

We first remark that the maximum height on September 22nd, 1905, is of no significance for the canal had been constructed in October, 1904, and hence Rockwood had not that experience. Of the other three, let it be observed that no two of them occurred in the same month and each was a single flood wave of short duration. Now, the fact that these maximum heights have been known to occur out of the usual annual flood season did not put the defendant upon notice of possible dangers for these reasons:

1. Neither one of them resulted in any flood in the Salton Sink at all, unless it should be said that of February, 1891. But, as we have before said, that did not do so, for the flood did not come until May or June.

Durbrow, Tr. Vol. II, page 642.

On that occasion the flood mark was attained on Feb-

ruary 23rd and continued for one day or less, the overflow continuing to March 2, and then the gauge went down and remained below the flood mark continuously until May 6th. Hence, there were only eight days in February of a flood mark on the gauge and the flood into Salton did not come until the summer flood following.

The next out of season flood period is January 25, 1895. This would seem to be a mistake. The maximum in that year was January 21st, but again it will be observed that the flood period, even if we assume 22 as the overflow mark, continued for only six days, and there were no waters flowing into the Salton Basin from any flood during that year.

The next one noted in the printed document is December 20th, 1896, where it is said the height was 24.5. We do not know how to account for that, for, according to the gauge heights as given at Vol. VI, page 2204, for 1896, the gauge did not reach the flood point in the month of December at all, nor in November, nor in October, nor in September, until the 29th and 30th. Those were the only two days in which the flood mark was reached, if we assume that it was then 23 instead of 22, and only three days if we take 22. The 30th of September does appear to have been the maximum point for that year, but in comparing it with the flood seasons of May and June it will be seen that the water did not last for any length of time, and there was no flood, if we include 1905, in which it is said the maximum was reached on November 30th—

See Published Report, p. 17,

and which is given as 31.3 inches. This corresponds with the report for the whole year of 1905.

Same Volume, page 15.

But note now that the point of overflow was not reached until the 26th of November, where it was 26.2, and it continued over the flood point until December 3rd, a total of five days. But this is one of the floods which happened during the period here under consideration and created its havoc mainly because it was only one of a succession of floods during the same year.

2. To constitute an act of Providence it is not necessary that storms or floods should be unprecedented. If it is unusual, extraordinary and unexpected it is an act of God, and the defendant will not be liable, although such a thing may have occurred before.

Norris v. Savannah, Fla. & Western Ry. Co., 11 Am. St. 355, 358-359.

There it was claimed that the rise should have been foreseen because it had occurred in 1882 and in 1883, but the court said that that fact did not deprive the rise of 1884 of the character of an act of God, or required the appellee to have reconstructed its road or provided other means of transportation across the river to meet such emergency.

Pittsburg, Ft. Wayne & Chicago Ry. v. Gilleland; and same v. McClinton, 94 Am. Dec. 97, 104-106.

The same point is decided and the diligence required of parties concerning such matters is discussed. We quote only this much:

"In effect this was to leave it to the jury to find liability for extraordinary floods because a second and third happened like the first and came in rapid succession. If all were extraordinary, as the instruction conceives, the surprise at the second and third could not be less than at the first, and it was still more surprising that they should come in this rapid succession. Being extraordinary, neither the second nor third could have been expected more than the first."

Hence, upon the principles of these cases, the floods in January, February and March of 1905, and those which occurred subsequently in December of the same year and at other periods of 1906, were not any more to have been anticipated because of the fact that in three instances before, in different months, floods had occurred outside of the usual annual overflow. Neither was the defendant to anticipate the terrific destruction occasioned by such a flood if it should happen to occur, for none such had ever occurred before, and it would not have been occasioned this time, but for what we have so frequently alluded to, viz., the unprecedented, unheard of, continuous floods.

Finally, upon this subject and upon the question of negligence or no negligence, it is submitted that it is to be regarded by this court and considered from the standpoint of the parties at the time the thing was done and not from the events which have occurred subsequently.

In

Long v. Pa. R. R. Co., 147 Pa. St. 343, 30 Am. St. Reps. 732, 735-736,

which opinion was written concerning the Johnstown

flood, the court at the pages indicated, explicitly held in accordance with this proposition.

While on this subject we call attention to other propositions applicable alike to the question of whether an injunction should have been issued in this cause or the damages awarded.

The burden of proof is upon the plaintiff and to warrant the court in issuing an injunction, the evidence should be clear and explicit. We have already cited some of the authorities to the effect that the proof must be clear and convincing and the damage real and substantial.

Yarwood v. West L. A. Water Co., 132 Cal. 204;
Fisher v. Feige, 137 Cal. 39;
Coleman v. Le Franc, 137 Cal. 214;
Real del Monte Min. Co. v. The Pond Min. Co., 23 Cal. 83, 85.

It is not enough for the plaintiff merely to produce a conflict in the evidence, nor even a probability of the result. Courts of equity will not grant injunctions and undertake to control the management of the business of people or restrain them in the exercise of their property rights unless the right to the injunction is clearly proven by competent evidence. Merely to raise the probability of irreparable injury is not sufficient.

McCarthy v. Bunker Hill & Sullivan Min. Co., 147 Fed. 981, 984.

The injunction will not be granted on conflicting evidence.

Bank of Commerce v. McAfee, *et al.*, 34 S. E. 1037.

Nor upon doubtful evidence.

Philadelphia's App., 78 Pa. St. 33.

That the burden of proof is upon the plaintiff is decided in

Hampson v. Adams, 57 Pac. 621, 622.

And furthermore, where the act of God concurred with the act of the defendant, the burden of proof is upon the plaintiff to show that the injury was not the result of the act of God.

Morris v. Receivers, etc., R. Co., 65 Fed. 584-585.

We quote this one remark:

"Our law holds that where damages occurred from an act of God and from the negligence of man concurring co-incidentally, there can be no recovery unless it be affirmatively proved that if there had been no act of God the damage would still have occurred."

In all legal controversies the plaintiff must prove, by a preponderance of evidence, the facts which constitute his cause of action, and the damages must be proven by evidence which fairly leads to a certain conclusion. If it is left as a mere matter of conjecture the proof is not sufficient.

Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 364;

Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557;

Soremson v. Menasha P. & P. Co., 14 N. W. 446, 447-448;

Trapnel v. City of Red Oak Junction, 39 N. W. 884, 885.

Before passing this, we call attention to one kind of evidence introduced in this case upon this subject of negligence, which, it is submitted, is absolutely worthless, and indeed, is not competent at all. These were certain declarations of officers of this company offered in this case. Among them Drury testifies that Rockwood, when first at Salton, looking over the waters, said that he supposed that he would have to pay for the damage then done.

Tr. Vol. V, pages 1970, 1971.

Rockwood denies this.

Tr. Vol. IV, pages 1573 and 1574.

Another declaration claimed to be made by somebody, either Chaffey or Rockwood, or Chaffey in the presence of Rockwood, is that he could cut a canal that would take the waters of the Colorado river and fill the Salton Sink in sixty days to such an extent that it could not be gotten out in sixty years. Of what place this statement referred to, nobody seems to have known.

Testimony of Ferguson, Cross-examination, Vol. II, page 426.

But these declarations are admitted apparently for the purpose of bringing home to the defendant a knowledge of the fact that there was danger from the cutting of these canals. Of course, no one can be held respon-

sible for things which he could not foresee, and to constitute negligence, it must be shown that the party has knowledge of the dangers or that the facts are such that, as a prudent person, he ought to have known.

But these declarations, it is submitted, were not admissible in evidence at all. Even if Rockwood had been the agent of the defendant, his declarations sought to be proved against him would not have been admissible under any principle. The rule admitting declarations of an agent is founded upon the legal identity of the agent and principal, and therefore they bind only so far as there is authority to make them.

1st Greenleaf on Evidence, Sec. 114.

And see

1st Greenleaf, Secs. 108 to 114.

Whenever these declarations are merely narrative of a past occurrence, they cannot be received as proof of such occurrence.

1st Greenleaf, Sec. 110.

The declaration of Rockwood that he supposed that he would have to pay for this has no tendency to show that he had knowledge, when the intake was constructed, that any such a result would follow. On the contrary it would seem to very strongly imply that he did not have the knowledge.

As to the other declarations, they are only admissible upon the theory that some such relation existed as agency, partner, etc., and that the declarations were

made while he was engaged in the business concerning which they were made.

Strong's Executors v. Brewer, 17th Ala. 706;
Walden v. Purvis, 73 Cal. 518;
20th Century Digest, Col. 1233, Sec. 867;
Walker v. Blassingame, 17th Ala. 810;
Gregory v. Walker, 38 Ala. 26;
Prater v. Frazier, 11th Ark. 249.

They must be made while engaged in the performance of an act in the scope of his authority and at the time he is doing it and must be concerning the act he is doing.

Garfield v. Knight's Ferry, etc., Water Co., 14 Cal. 36;
Neely v. Naglee, 23 Cal. 152;
Herman Waldeck & Co. v. Pac. Coast S. S. Co., 83 Pac. 58;
Barkly v. Copeland, 86 Cal. 483, 492;
People v. Stanley, 47 Cal. 114.

They are not admissible as the declarations of an officer of a corporation.

1st Johns on Evidence, Secs. 269-270;
American Life Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593, 595;
Packet Co. v. Clough, 87 U. S. 528, 22 L. Ed. 406, 408;
Fogg v. Pew, 71 Am. Dec. 662, *Id.* 664;
1st Natl. Bank of Lyons v. Ocean Natl. Bank, 19th Am. Rep. 181, 191-192.

A corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators or stockholders or clerk.

2nd Cook on Corporations, Sec. 727;
Davis etc. Co. v. Davis etc. Co., 20 Fed. Rep. 699, 700-701;
Goodloe v. Godley, 21 Miss. 233;
Edwards v. Carson Water Co., 21 Nev. 469.

Of the supposed declaration of somebody that a canal could be cut that would put in the Salton Basin the waters of the Colorado in sixty days that could not be gotten out in sixty years, there is this further to be said. Nobody pretended to say to what the supposed declaration was alluding. The remark itself seems to be the statement of something to be avoided rather than to be done. It is not in any way connected with any one of the three intakes, and it could have had no reference to any except the first, for that is the only one that Chaffey had anything to do with.

Tr. Vol. II, page 426.

XIX.

The court erred in giving a decree in this cause either for the injunction or the damages, or any part of said damages.

Of course if we are correct in our contention that the injury was not due to the negligence of the defendant, but was the act of God, plaintiff was not entitled to any relief against the defendant.

So, too, we maintain that if an injunction could not be

given in this cause because of the absence of parties materially to be affected thereby, then the bill should have been dismissed.

It has no doubt been held in many cases, that where a court of equity has acquired jurisdiction on some grounds of equity jurisprudence, and at the commencement of the suit the plaintiff was entitled to relief by injunction or other equitable relief, but from some cause intervening after the commencement of the suit, the right to equitable relief has ceased, the court may nevertheless proceed to award the relief to which the plaintiff may have proved himself entitled, though that relief might not have been of a character over which the court of equity had jurisdiction. But we take it that the rule is universal that where a bill is filed for equitable relief, and other relief is sought incidentally thereto which is not of itself within the cognizance of a court of equity, if there is a failure of proof of the equitable cause of action, and it is determined by the court that the complainant was not at the commencement of the suit entitled to the relief in equity, the bill will be dismissed and will not be retained for the purpose of allowing legal relief though plaintiff may have shown himself entitled thereto.

Dowell v. Mitchell, 105 U. S. 430, 26 L. Ed. 1142.

From this case we quote the following passage:

"The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and

should dismiss the bill and remit the cause to a court of law."

26 L. Ed. 1143. (Many cases are cited.)

To the same effect we cite the following cases:

Clark v. Smith, 86 N. Y. Suppl. 472, 474;
Crowell v. Young, 64 S. W. 607, 608-609;
Dodd v. Home Mutual Ins. Co., 28 Pac. 881, 884;
Denny v. McCown, 54 Pac. 952, 954;
Dakin v. Union Pac. Ry. Co., 5 Fed. 665, 666;
Alger v. Anderson, 92 Fed. 696, 707, 712-713, 714.

In this last case the question is very thoroughly considered, and the authorities, both English and American, reviewed.

Kessler v. Ensley Company, 123 Fed. 546, 547;
Capen v. Leach, 65 N. E. 63.
Collier v. Collier, 33 Atl. 193,

goes further and holds that it is by no means a universal rule that a court of equity will proceed to give legal relief, although the equitable right may be proven, and cites, among other cases,

Iszard v. Water Power Co., 31 N. J. Eq. 511.

And then the court makes this remark:

"A moment's reflection will satisfy every one that nothing could be more mischievous than the adoption of the principle contended for by the complainant. In such case it would only be necessary for the defendant in an action at law to make some pretense of claim against the plaintiff in such action of fraud, mistake, accident or right to an account, in order to change the forum of liti-

gation, and to compel the determination of questions purely legal in a court of equity."

33 Atl. 194.

And where one against whom the plaintiff's demand is purely legal is unnecessarily made a party to a suit in equity, the legal demand cannot be enforced in that suit.

Bradford v. Long, 4 Bibb (Ky.) 225;

Fultz v. Walters, 2 Mont. 165.

The plaintiff never was entitled to an injunction in this cause, and the bill should have been dismissed.

XX.

The evidence in the cause was insufficient to prove the damages alleged and for which the judgment was given, or any item thereof, and the evidence in the cause is too uncertain to establish any amount of damage suffered by the complainant.

We have already established by the authorities cited the following propositions:

1. The burden of proof was on plaintiff.

2. That under the conditions admittedly present in this cause, the burden of proof was upon the plaintiff to show that the injury was not caused by the act of God.

3. That if part of the damage was due to the negligence of the defendant, and another part to the act of God, the burden was upon the plaintiff to prove convincingly what part was due to the negligence of the defendant, and as to the other part, the plaintiff was not entitled to recover.

4. That the burden is not only upon the plaintiff, but

the facts upon which the right of action depends, must be proven clearly and convincingly.

5. It is not enough to establish facts from which an inference might be drawn, but the facts must lead by certain and definite conclusion to the inference against the defendant.

6. In the proof of damages, the amount ascertained must be either directly established, or the amount must be the fair and legitimate conclusion from the evidence; to establish facts from which either the existence of damage or the amount may be conjectured, or afford the material for a guess, does not entitle the plaintiff to recover at all.

Under this proposition, we call the court's attention to the following objections to the evidence:

1. In awarding damages for the buildings, machinery, etc., the evidence is mainly directed to the proof of cost of reconstructing the buildings.

Frederickson, Tr. Vol. II, pages 572 *et seq.*

Drury, Vol. II, pages 558 *et seq.*, and pages 613 to 617.

To do this, prices of material were taken which were obtained from lumber merchants in part, within a week before the evidence was given, although the destruction occurred nearly two years before. The price, too, was the price at Los Angeles.

The buildings were, many of them, of many years standing, and the machinery had been long in use. And it is submitted upon the evidence of the character which we have just stated, the court could not form any certain

and definite conclusion as to the amount of damage suffered by the plaintiff.

2. The salt crust. To this we have already referred. The manner of ascertaining the amount of the salt crust did not warrant any definite conclusion as to the amount. The compensation made was the full value as testified by the plaintiff, of that salt crust. And that assumed, of course, that the salt crust was utterly destroyed. And that fact is not only not established by any clear and convincing evidence, but the evidence shows beyond controversy that it wasn't lost, that it was simply held in solution, and there was no reason to believe that the plaintiff's salt beds would have any less salt when the water was evaporated than it had before the flood.

It is uncertain where that salt crust was located.

Testimony of Henton, Tr. Vol. II, pages 627 *et seq.;*

Testimony of Sherman, Tr. Vol. II, pages 469 *et seq.,* and page 476;

Testimony of Drury, Tr. Vol. II, pages 598 *et seq.* and 619 *et seq.*

And see testimony of Durbrow as to the effect of the flood of 1891 on the salt.

Tr. Vol. II, pages 643, 646, 647, 661.

As to other times, from rains,

Pages 653, 654, 658.

3. It was shown by the evidence that the plaintiff never did manufacture or take salt from any lands except a part of section 15, and section 22, and upon this latter

section they were mining at the time of this destruction, and had been for a long time previous.

Now, the lands in section 22 did not belong to the plaintiff, and yet it is not certain that in the estimate of the 1,500,000 tons the witnesses were not including salt crust on section 22 as well. The salt was then being mined from section 22, which the complainant did not own.

Tr. Vol. II, p. 629.

4. The plaintiff was not entitled to recover for the salt in the vats.

The evidence shows that this salt was all on section 22, and that the plaintiff was not the owner of the land, nor of any right, title nor interest in it.

See description in the bill of complaint,

Tr. Vol. I, p. 7 (Complaint in Superior Court),
id. p. 61 (Bill in Equity).

In the decree,

Tr. Vol. I, p. 136.

In the evidence,

Exhibits D to L, inclusive, Tr. Vol. V, pages 2034 *et seq.;*
Henton, Vol. II, page 623.

These vats were shown to consist of trenches or pits dug in the ground, of varying lengths where the waters naturally in the soil are all the time seeping in, and evaporated leaving the salt, and when evaporated the salt in the vats is left on section 22.

5. In the items of damage in the summary [Vol. I, p. 132], is "Salt destroyed at mill."

Now a large part of that salt had been moved once, but wasn't moved out of danger. And the expense of protecting works and moving salt is also charged up in the bill, and is allowed in the decree.

Tr. Vol. I, p. 132.

They took the wreckage of one of the buildings, and built another building. And that was subsequently destroyed by the flood. And we are charged with the work of moving it, and with the buildings destroyed.

They constructed a levee which was utterly insufficient for protection, and which was itself swept away.

Drury, Tr. Vol. II, pages 601 and 602, 605 to 610;

Henton, *id.*, pages 628 *et seq.*

It is the established doctrine that there is an obligation imposed upon him whose property is threatened with destruction, or, damage is about to result either from a tort or breach of a contract, to use all reasonable means to make the damages as small as possible.

Mabb v. Stewart, 147 Cal. 413, 417, 419;

Warren v. Stoddart, 105 U. S. 224; 26 L. Ed. 1117, 1120;

Baird v. United States, 17 Wall. 463, 21 L. Ed. 519.

And this the plaintiff recognized, and undertook to prove that it had discharged that burden.

Drury, Tr. Vol. II, pages 601 *et seq.;*

Henton, Vol. II, p. 627.

But it will be seen that much of the property was moved twice, and yet destroyed by the subsequent rise of the waters. From the time the waters began to threaten the plaintiff's works, the plaintiff could have removed everything there was there to destroy except the salt crust. It has endeavored to excuse the building of an insufficient levee by saying that they hoped by the levee to gain time to move the property. But looking at the evidence of the time that it took them to build the levee, and up to the time the water reached the levee, they could have moved everything.

Now, the point we make upon this proposition is this:

The New Liverpool Salt Company knew everything about that country, the Colorado river, its various overflows, the channels which they had made, the elevation of the Salton Sink, that it was far below the sea level; we say it knew all these things, or ought to have known them better than the defendant.

The plaintiff's works were established in 188—

Tr. Vol. II, pages 634 *et seq.*

It was there in the flood of 1891, and its property was injured during that flood.

If it could have removed the property from danger and did not, was it not, under the circumstances, guilty of negligence, and was not the loss of much of its property the result of its own negligence, and not that of the defendant?

It makes little difference, as it seems to us, which way this question is answered.

That the plaintiff could not be held guilty of negligence in not foreseeing the results that happened, we are

not disposed to deny. But if it was not guilty of negligence in not anticipating such results, then upon what ground is the defendant to be held guilty of negligence in not foreseeing the same thing? If proper prudence required the defendant to anticipate such havoc, then proper prudence required plaintiff to remove this property to a place of safety. If it built a levee which it ought to have foreseen would prove insufficient, upon what principle can the cost of that construction be charged to the defendant?

Finally, we submit that the evidence of the plaintiff does not proceed upon the true measure of damages; that if we are to proceed upon the theory that this was a permanent injury, then the difference between the value of the plaintiff's property before and after this flood, was the true measure of damages.

And no proof was offered of any such damages.

In many cases it has been said that the rental value, where the injury is not permanent in the sense of being everlasting, is the true measure.

But if that measure were adopted here, then the defendant could not be charged with the value of the salt, for, as the land had no other value than for the salt upon it, its rental value would have consisted of the carrying on of a business which would eventually exhaust the property of all value.

XXI.

The court erred in giving judgment in favor of the complainant for the sum of $456,746.23.

To this is added, that the complainant was not entitled to recover any damages at all in this suit.

Every question involved in this specification has already been sufficiently discussed.

XXII.

If the complainant is entitled to recover damages at all, the court erred in awarding damages up to the time of judgment.

The point here intended to be raised is this: If the injury here is not permanent, and the plaintiff is entitled to recover at all, then it was only entitled to recover damages accruing up to the time of the commencement of the action.

XXIII.

The court erred in permitting the complainant to file the several supplemental bills herein.

Upon this proposition we desire to add nothing further than this:

1. If the plaintiff was not entitled to the injunction from the beginning, it was not entitled to recover any damages, and as the supplemental bills deal with nothing but additional damages, they ought not to have been allowed.

2. If the plaintiff was entitled to recover damages only up to the time of the commencement of the suit, it

was not entitled to file these supplemental bills, nor to recover in accordance with them after they were filed.

It is respectfully submitted that because of the errors aforesaid, the decree herein ought to be reversed, with directions to the court below to dismiss the bill.

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